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In The

Supreme Court of the United States

DAVID ROLAND HINKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. DOES A DEFENDANT HAVE A RIGHT TO PROVE THAT THE GOVERNMENT'S CHIEF WITNESS HAS TESTIFIED FALSELY AND TENDERED FORGED DOCUMENTS ON AN ISSUE CRITICAL TO THE GOVERNMENT'S CASE – HERE, WHETHER THE WITNESS SERVED HIS COUNTRY IN COMBAT?

II. DID THE DIVIDED EN BANC PANEL OF THE NINTH CIRCUIT ERR IN HOLDING THAT A WITNESS'S PERJURY AND FRAUD CONCERNING HIS MILITARY RECORD WOULD BE OF "LIMITED PROBATIVE VALUE" TO JURORS ASSESSING THAT WITNESS'S CREDIBILITY?

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INTRODUCTION

By a six to five vote, an en banc panel of the Ninth Circuit issued two extraordinary rulings in petitioner Hinkson's appeal of his convictions and forty-three year sentence. The majority held that, in exercising its discretion under Federal Rule of Evidence 403, a trial court may exclude conclusive proof that the government's principal witness came to the stand intending to, and did, perjure himself and tender forged documents concerning an issue crucial to the jury's determination of guilt or innocence. The majority below also found that dispositive evidence that the government's key witness was a military fraud would have been of "limited probative value" to jurors assessing his credibility.

The crimes of which defendant Hinkson stands convicted allegedly consisted of words – the solicitation of the murder of three federal officials – spoken in a conversation with a single party, Elven Swisher. Swisher testified at trial that when he told Hinkson about his military exploits – including "killing too many" men – Hinkson offered him $10,000 to kill the federal officials.

Testifying in his own defense, Hinkson denied that he had solicited murder, and denied that Swisher had told him about his vast military exploits. No physical evidence – written orders, tape recordings, money or weapons exchanged – corroborated Swisher's claim of having been solicited to kill. As Chief Judge Kozinski stated dissenting from the

denial of rehearing of the en banc opinion in this case, "[w]ithout Swisher, the government had no case." *United States v. Hinkson*, 611 F.3d 1098, 1099 (9th Cir. 2010) (Appendix 1-28, hereafter "App.").

The solicitation statute under which Hinkson was charged (18 U.S.C. § 1114) required proof of "circumstances strongly corroborative of" the commission of the charged solicitation. The government relied on Swisher's personal history as a combat-hardened veteran to corroborate its claim that Hinkson sought Swisher's assistance in the nefarious plot. "The prosecutor described Swisher in his opening statement as a 'Combat Veteran from Korea during the Korean Conflict' who 'was not averse to . . . violent, dangerous activity,' and stated in his closing argument that Hinkson 'understood' that Swisher 'had served in combat and killed people.'" 611 F.3d at 1132 (W. Fletcher, J., dissenting from the denial of rehearing en banc) (App. 26-27).

As the government now concedes, Swisher was a military fraud. Swisher had testified before the grand jury that indicted Hinkson that he (Swisher) was wounded during the Korean War, but as prosecutors discovered before putting him on the stand at trial, the Korean war was over before Swisher enlisted in the Marines. Caught in one lie, Swisher told the prosecutors another: that he was wounded during secret operations in North Korea after the 1953 truce. In fact, Swisher had never been either in combat or in Korea, but he showed prosecutors forged discharge documents to support this audacious claim. Swisher

previously had used the same documents in an ongoing scheme to fraudulently collect Veteran's Administration benefits for combat related injuries.

Swisher then committed a crime of moral turpitude by taking the witness stand at Hinkson's trial wearing a phony Purple Heart commendation; he lied under oath in claiming to have been in combat in Korea; and he displayed to Hinkson's jury the forged paperwork falsely attesting to his receipt of a slew of commendations earned in combat.

By the close of Hinkson's trial, the judge, prosecution team, and defense counsel were in possession of irrefutable confirmation that Swisher had perpetrated a fraud on the court. Swisher's military records by that time had been obtained by subpoena. Only the jury remained ignorant that they had been lied to, because the district court barred admission of the records, and the prosecution in closing relied on Swisher's tales of military heroics without warning jurors that the government's chief witness had lied to them under oath. Following his testimony against Hinkson, Swisher was convicted in the district court in Idaho of wearing fraudulent military commendations, of lying to federal officials by claiming service in combat, and of defrauding the Veteran's Administration of benefits for combat injuries. 611 F.3d at 1112 (App. 10-11).

The jury convicted Hinkson only because the defense was barred from presenting any evidence regarding Swisher's lies and fraud. The en banc

majority below upheld the trial court's exclusion as an exercise of discretion. Its ruling eviscerates the right to present a defense. Under the majority's analysis, a defendant possesses no meaningful statutory or constitutional right to present evidence; all is a matter of judicial grace. That ruling is flatly at odds with a number of seminal decisions of this Court on the right to present a defense under the Fifth and Sixth Amendments, as well as with many decisions from other circuits. Indeed, the six to five decision cannot even be said to represent the majority view of the Ninth Circuit. Because of the Circuit's size, an en banc panel consists of less than half of the full court's membership, and a previous en banc decision of the circuit on a similar issue reached a contrary result by a vote of ten to one.[1] A grant of certiorari is needed to both address the important constitutional issues concerning the right to present defense evidence that this appeal raises, as well as to resolve the precedential conflicts the opinion below has created.

Furthermore, the lower court's ruling that exposure of Swisher as a military fraud would have been of "limited probative value" to jurors assessing his credibility flies in the face of this country's political and social realities, as well as this Court's recent ruling in *Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447 (2009). Chief Judge Kozinski initially voted to

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[1] *See* Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 844 n. 52 (2009).

affirm Hinkson's conviction before later joining the dissenters who voted to vacate the en banc opinion and rehear the matter, stating:

> I had underestimated the trust some jurors would have placed in Swisher if they thought he was a decorated combat veteran, and the likely backlash if they had learned he was a fraud. My change of heart came about after I read the Supreme Court's summary reversal in *Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447, 175 L.Ed.2d 398 (2009), and the amicus brief of William Mac Swain [the head of a combat veterans' association] filed in our case.

611 F.3d at 1099 (App. 1-2).

This Court can expeditiously remedy the majority's grave error by granting certiorari, summarily reversing the judgment below, and remanding this matter to the Court of Appeals for reconsideration in light of *Porter*.

CITATION OF OPINION BELOW

The official reporter citation of the en banc opinion, reproduced at Appendix 29-72, is *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009).

STATEMENT OF JURISDICTION

On May 30, 2008, a three-judge panel of the United States Court of Appeals for the Ninth Circuit issued a published opinion reversing petitioner's convictions for solicitation of murder and remanding the matter to the district court. *United States v. Hinkson*, 526 F.3d 1262 (9th Cir. 2008) (App. 74-106). On November 5, 2009, an en banc panel of the Ninth Circuit issued a published opinion in which they reversed the panel's decision. (App. 29-72). Hinkson's petition for rehearing of the en banc opinion was denied in a published order on July 14, 2010. *United States v. Hinkson*, 611 F.3d 1098 (9th Cir. 2010) (App. 1-28).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to

a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Federal Rule of Evidence 403, 28 U.S.C.A. provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

A. The Charges

On June 22, 2004, a superceding indictment was filed on September 21, 2004 in the District of Idaho charging defendant Hinkson with eleven counts involving threats to three federal officials: District Court Judge Edward Lodge; Assistant United States Attorney Nancy Cook; and IRS Special Agent Steven Hines. All three officials had been involved in the prosecution of Hinkson pursuant to an earlier

indictment on tax and currency structuring charges returned on July 18, 2002.[2]

Counts One, Two, and Three charged that in early to mid-January of 2003, Hinkson solicited James Harding to murder Lodge, Cook, and Hines respectively, "under circumstances strongly corroborative of" Hinkson's intent that Harding commit that crime, in violation of 18 U.S.C. § 1114. Counts Four, Five, and Six charged that in March 2003, Hinkson again solicited Harding to murder Lodge, Cook, and Hines in violation of 18 U.S.C. § 1114.

Counts Seven, Eight, and Nine charged that around January 2003, Hinkson solicited Elven Swisher to murder Lodge, Cook, and Hines "under circumstances strongly corroborative of" Hinkson's intent that Swisher commit that crime, in violation of 18 U.S.C. § 1114.

Counts Ten and Eleven charged that between January and March of 2003, Hinkson made unlawful threats to Ann Bates against Cook's family and Hines's family in violation of 18 U.S.C. § 115(a)(1)(B).

The jury found Hinkson not guilty of the first set of Harding solicitation charges (Counts One, Two, and Three) and the Bates threats charges (Counts

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[2] Hinkson was tried and convicted of 32 counts of tax and structuring charges on May 5, 2004. The solicitation offenses in the September 2004 indictment allegedly occurred while Hinkson was on pre-trial release.

Ten and Eleven), and deadlocked on the second set of charges involving Harding (Counts Four, Five, and Six). It convicted Hinkson of the Swisher solicitation charges (Counts Seven, Eight, and Nine).

B. Hinkson's New Trial Motion And Sentence

On March 3, 2005, defense counsel moved for a new trial under Federal Rule of Criminal Procedure 33. The motion relied on, *inter alia*, "newly discovered evidence." The district court denied the motion on April 22, 2005.

Hinkson was sentenced on June 3, 2005, for his solicitation convictions as well as for his tax-related and currency structuring convictions. He received a total of forty-three years in prison: ten years on the tax and structuring charges, ten years on each of the three solicitation charges, and an additional three years for having made the solicitations while on pretrial release in the tax case.

C. Appellate Proceedings In The Ninth Circuit Court Of Appeals

On May 30, 2008, the Ninth Circuit reversed the district court's denial of Hinkson's motion for a new trial on Counts Seven, Eight, and Nine. *United States v. Hinkson*, 526 F.3d 1262 (9th Cir. 2008) (App. 74-106). However, on November 5, 2009, an en banc panel of the Ninth Circuit reversed the panel's decision, holding, *inter alia*, that the district court had

not abused its discretion in denying Hinkson's new trial motion. *United States v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009) (App. 29-72).

Hinkson thereafter petitioned the Ninth Circuit to order a rehearing of the limited en banc panel opinion either by the full Court or by the same limited en banc panel. Hinkson's petition for rehearing was denied on July 14, 2010. *See* Order on Rehearing, 611 F.3d 1098 (9th Cir. 2010) (App. 1-28). Circuit Justice Anthony Kennedy granted an extension of time for this petition for certiorari until November 11, 2010. A petition in forma pauperis was timely filed on that date. Because of problems relating to petitioner's in forma pauperis status, on November 16, 2010, this Court granted petitioner an additional sixty days, to resubmit his petition. The present petition is therefore timely.

REASONS FOR GRANTING REVIEW

I. DEFENDANT HINKSON WAS DENIED HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO CONFRONTATION, AND TO A FAIR TRIAL WHEN THE TRIAL COURT BARRED HIM FROM PROVING SWISHER'S PERJURY AND FORGERY OF DOCUMENTS

The Sixth Amendment guarantees the right "to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19

(1967); *see also Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986) (Under the due process, the compulsory process, or the confrontation clauses, a defendant possesses the "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful testing'" (internal quotation marks omitted)). "Restrictions on a criminal defendant's rights . . . to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

The federal circuits well recognize the right to present a defense and reverse convictions resulting from its violation. *See, e.g.*, *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir. 1979) (holding that the defendant's right to present a witness in his own defense was violated where the trial court excluded, on relevancy grounds, testimony intended to present a feasible defense that the jury should have been permitted to consider); *Noble v. Kelly*, 246 F.3d 93 (2nd Cir. 2001) (holding that exclusion of material witness testimony due to noncompliance with state court rule violated compulsory process clause absent finding of willful noncompliance); *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991) (finding reversible error in a sexual assault case where trial court did not permit cross examination of alleged victim regarding prior sexual activity with a third person, or cross examination of physician regarding whether symptoms were caused by defendant or third person).

Prior to the *Hinkson* decision, the Ninth Circuit had vigorously upheld the right to present relevant

defense evidence against the contention that such evidence could be excluded as a matter of judicial discretion. *See United States v. James*, 169 F.3d 1210, 1215 (9th Cir. 1999) (en banc) (holding that district court abused its discretion in excluding under Fed. R. Evid. 403 evidence corroborative of defendant's testimony that she acted in self-defense against violent predator). In *James*, ten judges of the Ninth Circuit, none of whom was part of the seven-judge *Hinkson* majority, and five of whom are still members of the court, rejected the single dissenting view of Judge Kleinfeld, who was one of the *Hinkson* majority, that this Court must "defer to a district judge's discretion, when the trial judge had a sensible reason for exercising his discretion as he did." 169 F.3d at 1215.

Hinkson argued to the Court of Appeals that under this Court's precedents and those of the Ninth Circuit itself, he was entitled as a matter of constitutional and statutory right to introduce documentary evidence that conclusively proved (a) that Swisher had never served and been wounded in, much less received commendations for, combat in Korea or anywhere else; (b) that his statements concerning his combat experience to Hinkson (if indeed Swisher made any such statements) and to government prosecutors were lies; (c) that his testimony on the same subject before the grand and petit juries was perjured; and (d) that at the time of his testimony Swisher was receiving fraudulently obtained financial benefits based on the same forged document that he proffered at trial. Hinkson argued that the district court had erred both in excluding during trial the

evidence that Swisher was a military fraud and by denying his motion for a new trial following his conviction, citing *United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994) (abuse of discretion to deny new trial motion where motion establishes that prosecution testified falsely on material matter).

In affirming Hinkson's convictions, the en banc majority did not discuss any of the constitutional precedents relied upon by Hinkson, simply finding that neither the mid-trial exclusion of evidence nor the denial of petitioner's new trial motion constituted an abuse of discretion under the en banc majority's reformulated definition[3] of that standard:

> [O]ur newly stated "abuse of discretion" test requires us first to consider whether the district court identified the correct legal standard for decision of the issue before it. Second, the test then requires us to determine whether the district court's findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.

United States v. Hinkson, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc) (App. 4-5).

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[3] Only a few months before the en banc decision in this case in November of 2009, another en banc panel of the Ninth Circuit had stated the abuse of discretion standard of review in very different terms. *See United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1003 (9th Cir. 2009); *see also Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (en banc).

To quote Judge Henry Friendly, the majority's reformulation of the abuse of discretion standard requires that "the appellate court [must] come close to finding that the trial court had taken leave of its senses" before finding the standard met. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982). But even under the en banc majority's pinched standard of review, the district court's exclusionary ruling was deeply flawed in the first instance because the trial ruling rested on a fundamental error of law. The district court's principal rationale for exclusion was that the evidence dealt with a collateral matter, and thus was barred from admission by Rule 608(b). Rule 608(b), however, only covers evidence offered to show a witness's character for dishonesty. *See* Fed. R. Evid. 404(a)(3). The evidence in this case was not offered to show Swisher's general character for dishonesty – rather, it was offered to show his bias, self-interest, and his particular substantive lies *in this case*.

As the dissenters below cogently explained, the trial court's Rule 608(b) ruling was an obvious error of law because the evidence was admissible under Fed. R. Evid. 607, which "'permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence.'" *See* 611 F.3d at 1113 (App. 11-12), quoting *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999). Because the district court's ruling that the excluded evidence was more prejudicial than probative plainly rested in part on its flawed conclusion that the evidence was

inadmissible as a matter of law under Rule 608(b), the district court did indeed abuse its discretion.

Furthermore, this Court has not permitted the trial courts to exclude critical defense evidence so cavalierly. In *Olden v. Kentucky*, 488 U.S. 227 (1988), the Kentucky Court of Appeals, applying state Rule 403, upheld a trial court's bar on a line of cross examination tending to show that the state's chief witness, a white woman, had a motive to falsely accuse the defendant of rape – to hide from her husband an illicit affair she was having with a black man. The ruling that the impeaching evidence was more prejudicial than probative was not "illogical" or "implausible;" there are certainly jurors who would reject the testimony of a white woman sexually involved with a black man simply due to racism. That the state court ruling was reasonable could not save it from reversal by this Court, however, on the ground that it infringed on the defendant's "constitutionally protected right of cross-examination." 488 U.S. at 230-231.

Likewise, a trial court ruling barring cross examination on a witness's juvenile record is not irrational, especially when that record is protected by statute. Nor is it implausible to conclude principals, accomplices, or accessories in the same crime are so likely to lie that their testimony for one another might be inherently unreliable, as would be a defendant's testimony resulting from hypnosis. Yet this Court has overturned exclusionary orders resting on each of these reasonable bases as infringements on the respective defendants' right to a fair trial. *See*

Davis v. Alaska, 415 U.S. 308, 316-317 (1974); *Washington v. Texas*, 388 U.S. at 19; *Crane v. Kentucky*, 476 U.S. at 690-691 (1986); *see also Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that, because "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," state court erroneously excluded defense evidence of third-party culpability, requiring reversal of murder conviction and sentence of death).

According to the *Hinkson* en banc majority, there is no need to consider whether a criminal defendant has a constitutional right to present evidence so long as a rational basis exists to exclude that evidence under Rule 403. 585 F.3d at 1267 (App. 41-42). Yet even when there is a rational basis to exclude evidence, the exclusion will violate due process where the evidence is both reliable and crucial to the defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

In what was essentially a one-witness case, incontestable proof that Swisher came to court for the express purpose of lying under oath and proffering forged documents to the court was both reliable and crucial to the defense. Its admission was therefore required. Because the en banc majority's new abuse of discretion standard sustained the trial court's erroneous exclusion of that impeaching evidence, its application was unconstitutional in this case.

II. THE FINDING OF THE TRIAL COURT AND EN BANC MAJORITY THAT THE EXCLUDED EVIDENCE WOULD HAVE HAD "LIMITED" IMPACT ON THE JURY'S VIEW OF SWISHER'S CREDIBILITY MERITS SUMMARY REVERSAL

Given that Swisher's perjury is conceded by the government, this case thus turns on a judicial assessment of the attitudes of American jurors. Jurors are instructed that they may, but are not required to, reject all of the testimony of a witness if they determine that one part of that testimony is knowingly false. If one or more jurors would have deemed Swisher wholly unworthy of belief due to the lies he told in and out of court concerning his combat experience, then Hinkson is entitled to a new trial.

The cornerstone of both the en banc majority opinion and the district court's exclusionary order was the proposition that the excluded evidence exposing Swisher as a fraud had "limited probative value" in impeaching his credibility. 585 F.3d at 1267 (App. 41-42). That assessment necessarily assumes that even if the jurors at Hinkson's trial had learned Swisher was a military fraud, all twelve nevertheless would have accepted as credible Swisher's uncorroborated testimony that Hinkson made him a serious offer to pay for the murder of federal officials.

In contrast to the majority, the en banc dissenters asserted that (1) jurors would view the fact that a witness was "wounded in the service of his country" to be "an additional reason to believe his

testimony," but (2) the same jurors would consider fabricating military commendations to be an act of deceit "powerful enough" to render everything that person says "totally incredible." 611 F.3d at 1121 (App. 16-17). This nation's history of dealing with military frauds, as well as more recent events, demonstrate that the dissent's understanding of American jurors is correct.

After initially counting himself in the en banc majority, Chief Judge Kozinski joined the dissenters in voting to overturn Hinkson's solicitation convictions. He did so in part because of this Court's decision in *Porter v. McCollum*, where the Court found the state courts had acted unreasonably in discounting the impact that evidence of a defendant's "heroic military service" in combat in the Korean War would have had on a penalty phase jury in a capital case. This Court noted that: "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [defendant] Porter did." 130 S. Ct. at 455.

When General George Washington instituted our nation's first military award, he stated, "Should any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished."[4] Since then, public outrage

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[4] 152 Cong. Rec. H8821 (daily ed. Dec. 6, 2006) (statements of Reps. Salazar and Davis).

toward military imposters has remained strong. Veteran groups are so outraged by those who misrepresent their military service that they volunteer their time to "comb small newspapers searching for poseurs, file Freedom of Information requests for military files, and field requests for research help from employers, biographers and obituary writers," and even build their own on-line databases of verified valor-medal recipients.[5]

The Colorado Veterans Alliance disbanded after it was revealed that the organization's founder falsely claimed to have earned military commendations, including the Purple Heart. The board of directors explained that the founder's actions "permanently damaged the reputation of Colorado Veterans Alliance to the point that no future efforts can go forward."[6] In 2007, the mayor of Atlantic City resigned after it was revealed that he had embellished his military accomplishments.[7] When the director of a municipal water board in California was sentenced to three years probation and a $5,000 fine for making false claims of military valor, the public complained the penalty was inadequate.[8] The same was true when a

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[5] Urbina, *In Ranks Of Heroes, Finding The Fakes*, New York Times, Aug. 2, 2009, at A12.

[6] *Id.*

[7] *Embattled Colo. Man charged with violating Stolen Valor Act*, Marine Corps Times, Oct. 12, 2009, at 20.

[8] *See* Bigham, *Alvarez sentenced, can keep seat on water board*, San Bernardino County Sun, July 21, 2008.

local school committee member in Massachusetts was found to have lied about his military service.[9]

Here, Swisher presented himself to the jury as precisely what Porter was and Swisher was not: a combat hero wounded in the Korean War. The favorable impact of testimony on jurors had to have been enormous, as would have been the "backlash if they had learned he was a fraud," to use Chief Judge Kozinski's words. That fact was impressed upon Chief Judge Kozinski by the amicus brief in support of rehearing of the en banc opinion submitted by William Mac Swain, the President of the Korean War Veteran's Association. A quote from that brief is in order.

> What *amicus* is asking this Court to understand is that its reasoning and language are a slap in the face to veterans and jurors alike. For they imply – at a time when this nation is fighting two wars and losing more soldiers every month – that the average American no longer attaches any significance to a veteran's wartime service. That proposition is not merely unsubstantiated but unfathomable – profoundly out of step with the true views and sentiments of the citizens who serve on our juries.

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[9] *See* Harmacinski, *Stokes gets probation, community service for impersonating Marine; Judge says former School Committee member embarrassed entire community*, Eagle Tribune (North Andover, MA), May 22, 2008.

> This *amicus*, for one, disputes the notion that the typical American juror attaches little or no significance to a witness's claim that he is a decorated combat veteran – especially when the Government endorses that claim, as it did here. As the dissent rightly points out, a jury is more likely to believe such a witness, and may penalize the defense for attacking his credibility or questioning his military bona fides. This receptiveness to a combat veteran's testimony is not surprising. Indeed, it is both natural and just. It is a token of the respect, trust, and gratitude that most people feel toward those who have sacrificed to defend them.
>
> With equal certainty, this *amicus* refuses to believe that an American jury would convict a defendant based primarily on the testimony of one witness if it knew that the witness had passed himself off as a decorated combat veteran in a fraudulent play for the jury's sympathies. Most jurors would not hesitate to write off that witness as being "totally incredible" and "'utterly unworthy of being believed.'" This reaction, too, is both natural and just.

The majority cited nothing to support its implicit conclusion that not a single juror would have voted to acquit Hinkson had the trial court permitted his jury to learn that Swisher was a military fraud. Its opinion was issued prior to the issuance of the *Porter*

decision. That fact merits a summary reversal and remand for reconsideration in light of *Porter*.

CONCLUSION

For the reasons stated, certiorari should be granted and the matter set down for full briefing, or the judgment of the Ninth Circuit should be summarily reversed and the matter remanded for reconsideration in light of this Court's decision in *Porter v. McCollum*.

Dated: December 28, 2010

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

David Roland Hinkson,
Defendant-Appellant.

No. 05-30303

D.C. No.
CR-04-00127-RCT
District of Idaho, Boise

ORDER

Filed July 14, 2010

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Kim McLane Wardlaw, William A. Fletcher, Richard A. Paez, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta and N. Randy Smith, Circuit Judges.

Order:
Dissent by Chief Judge Kozinski;
Dissent by Judge W. Fletcher

ORDER

Appellant's Petition for Rehearing by the Limited En Banc Court and for Rehearing by the Full Court is denied. Chief Judge Kozinski and Judges Pregerson, Wardlaw, W. Fletcher, and Paez voted to grant the petition. The remaining judges voted to deny it.

The original en banc opinion filed on November 5, 2009 remains unchanged, except that Chief Judge Kozinski concurs only in the portion of the opinion that clarifies this court's abuse of discretion standard of review, but dissents from the application of that standard to the facts of this case as stated in his partial dissent filed today with this order. The original en banc dissent filed by Judge W. Fletcher on November 5, 2009 is vacated and replaced by the attached dissent filed today with this order.

No further petitions for rehearing will be accepted.

Chief Judge KOZINSKI, dissenting:

I continue to agree with, and join, that portion of the opinion explaining how we review for abuse of discretion, but now disagree with the application of this standard to the case before us. I had underestimated the trust some jurors would have placed in Swisher if they thought he was a decorated combat veteran, and the likely backlash if they had learned he was a fraud. My change of heart came about after I read the Supreme Court's summary reversal in *Porter v. McCollum*, 130 S. Ct. 447 (2009), and the amicus brief of William Mac Swain filed in our case. Without Swisher, the government had no case. I'm now persuaded that Judge Fletcher has the better of the argument for the reasons articulated in his dissent, which I join in full.

W. FLETCHER, Circuit Judge, dissenting, joined by KOZINSKI, Chief Judge, and PREGERSON, WARDLAW, and PAEZ, Circuit Judges:

I dissent.

Following a two-week trial in federal district court in Boise, Idaho, a jury convicted David Roland Hinkson of soliciting the murder of three federal officials. The government's star witness supporting the conviction was Elven Joe Swisher. Wearing a Purple Heart lapel pin on the witness stand, Swisher testified that he had told Hinkson that he was a Korean War combat veteran and that Hinkson, impressed by Swisher's military exploits, solicited him to kill the officials.

The government maintained in its opening statement to the jury that Swisher was a Korean War combat veteran, and it maintained throughout the trial that Hinkson's understanding of Swisher's military exploits showed that he was serious in his solicitations of Swisher. The government now concedes that Swisher neither served in combat nor earned any personal military commendations, and that Swisher presented a forged military document in court and repeatedly lied under oath at trial about his military record.

Hinkson makes three arguments on appeal. First, he argues that the district court wrongly excluded documentary evidence showing that Swisher presented a forged document and lied on the stand. Second, he argues that the prosecutor engaged in

misconduct when he invoked Swisher's military service in his closing argument despite having substantial reason to suspect that Swisher had lied about that service. Third, he argues that the district court abused its discretion in denying his motion for a new trial based upon his discovery after trial of new evidence conclusively establishing that Swisher had lied on the stand.

I would reverse the district court based on Hinkson's first and third arguments. I would hold that the district court abused its discretion when it excluded documentary evidence that would have contradicted Swisher's claim on the stand that he was a decorated combat veteran. I would also hold that the district court abused its discretion when it denied Hinkson's motion for a new trial. I would not reach Hinkson's second argument.

I. Background

The majority opinion recites some of the background facts relevant to Hinkson's appeal. In my view, however, the majority's recitation is too truncated. I begin by providing the background necessary to understand what went on during Hinkson's trial, and to understand why I believe the district court abused its discretion.

In an indictment filed on September 21, 2004, a federal grand jury in Idaho charged Hinkson with soliciting the murders of Assistant U.S. Attorney Nancy Cook, IRS Special Agent Steven Hines, and

U.S. District Court Judge Edward J. Lodge. All three officials had been involved in the investigation and prosecution of Hinkson on tax and currency structuring charges. Hinkson appealed his conviction on those charges in a companion case. The three-judge panel of which I was a member affirmed that conviction in a separate memorandum disposition.

The superseding indictment in the case now before us contained eleven counts. Counts 1-6 charged that Hinkson, in violation of 18 U.S.C. § 373, sought to persuade an acquaintance named James Harding to murder Cook, Hines, and Lodge, first in January 2003 (Counts 1-3) and again in March 2003 (Counts 4-6). Counts 7-9 charged that in December 2002 or January 2003, Hinkson, again in violation of § 373, sought to persuade Swisher to murder Cook, Hines, and Lodge. Finally, Counts 10 and 11 charged that Hinkson, in violation of 18 U.S.C. § 115, personally threatened to kill the children of Cook and Hines.

Hinkson was convicted on only the Swisher-related counts, Counts 7-9. The jury acquitted Hinkson on Counts 1-3, 10, and 11, and deadlocked on Counts 4-6. This appeal involves only the Swisher-related counts.

At several points during Hinkson's trial, the prosecutor emphasized Swisher's military background, and Hinkson's understanding of that background, in an effort to show the seriousness of Hinkson's solicitations. In his opening statement to the jury on January 11, 2005, the prosecutor stated

affirmatively that Swisher "was a Marine, a Combat Veteran from Korea during the Korean conflict. He was not adverse to this kind of violent, dangerous activity; but he wanted no part of murdering federal officials." However, during direct examination of Swisher three days later on January 14, the prosecutor did not ask Swisher whether he was, in fact, a Korean War combat veteran. Somewhat oddly, given his affirmative statement to the jury only three days earlier, the prosecutor asked Swisher only *what he had told Hinkson* about his military experience in Korea.

Swisher came to the witness stand wearing a replica of a Purple Heart on his lapel. A Purple Heart is an award given to members of the United States military who are wounded in combat. Swisher testified that he first became acquainted with Hinkson in 2000. According to Swisher, he had done some consulting work for Hinkson's company, WaterOz, and the two men had developed a friendship. Swisher testified that he had served in the Marine Corps. In response to the prosecutor's questions, he testified further that he discussed his military exploits with Hinkson on several occasions and told Hinkson that he had been in combat in Korea as a Marine. According to Swisher, Hinkson had asked whether he had ever killed anyone, to which Swisher said he had responded, "Too many."

Swisher testified that on various occasions in 2001 and early 2002, he and Hinkson discussed Hinkson's legal problems, particularly a civil suit

brought against Hinkson by a former WaterOz employee. Swisher testified that shortly after April 2002, Hinkson expressed "considerable" anger toward the employee's lawyer, Dennis Albers, and spoke in graphic detail about wanting to see Albers and his family "tortured and killed." Swisher testified that Hinkson offered him "$10,000 a head to do it," but Swisher "told [Hinkson] he was out of his mind and he needed to knock that kind of BS off."

Swisher testified that in July or August of 2002, Hinkson began to focus on his problems with federal officials. According to Swisher, Hinkson stated that Cook and Hines "had been harassing him a great deal," "abused the judicial system," "cost him a lot of money," and "didn't deserve to live." Swisher testified that Hinkson asked him if he "remembered the offer he made regarding Mr. Albers and his family" and "said he wanted that done, basically, with Ms. Cook and her family and Mr. Hines and his family." Swisher testified that Hinkson told him, "I know you're used to it. I mean, you have killed people [while serving in the military]." Swisher testified that he replied that he would report Hinkson to the authorities if Hinkson "continue[d] talking that way."

Swisher testified that after Hinkson was arrested on tax charges in November 2002, he had further conversations with Hinkson. According to Swisher, Hinkson "was extremely hostile to all of the people who had been involved in that arrest." In January 2003, Hinkson "went through the names of the people that had offended him, and added a federal judge by

the name of Lodge to that list." Swisher testified that Hinkson then offered him "[a]t least $10,000 a head" to have "them all treated the way that the initial offer regarding Albers and his family had been handled" – that is, "[t]ortured and killed." Swisher testified that Hinkson spoke in a "pleading fashion" about how "he just had to have this done." Swisher replied that he "never wanted to hear that again." After the January 2003 exchange, the two men had a serious falling-out, eventually resulting in a lawsuit and a nasty feud. Swisher testified that sometime after April 2003 he reported Hinkson's solicitations to a local Idaho prosecutor. At time [sic] of his testimony at Hinkson's trial in January 2005, Swisher was a bitter enemy.

On cross examination, defense counsel initially did not inquire into Swisher's military background. Instead, counsel sought to discredit Swisher by identifying inconsistencies in his testimony and by emphasizing the ongoing feud between Swisher and Hinkson. However, after having indicated that he had no further questions for Swisher, counsel asked to approach the bench. At the sidebar, he told the court, "For quite some time, [the defense has] been trying to dig into [Swisher's] military history." Counsel explained that, "[b]ecause of his age and because of the time of the war, we don't believe he was in the war. We also don't believe that he got a Purple Heart or was in combat." Counsel then told the court that he had just been "handed a letter from the National Personnel Records Center indicating that . . . the records fail to show that [Swisher] ever was

recommended for or awarded any person[al] decorations." Defense counsel noted for the record that Swisher was "wearing a Purple Heart on the witness stand, in the presence of the jury."

Still at the sidebar, the prosecutor responded that he never asked Swisher about "winning medals or combat" and had merely asked about "a conversation that [Swisher] had with Mr. Hinkson and what Mr. Hinkson asked him about." The prosecutor did not mention that three days earlier, in his opening statement to the jury, he had affirmatively stated that Swisher was a combat veteran from the Korean War. The prosecutor also stated at the sidebar, "For the record, he has a little – I don't know – you know, something stuck in his lapel. If somebody knows what that is, fine. No one has said what it is."

The court permitted the defense to reopen its cross examination of Swisher in order to ask about Swisher's lapel pin and about his service during the Korean War. In response to defense counsel's questions, Swisher testified that he was wearing "a Purple Heart Medal" that had been awarded to him by the U.S. government. He then explained that he had served in combat "[n]ot in the Korean War but following the Korean War." He said, "I was part of a special expedition, Marine Corps Expeditionary Unit that was engaged in combat after the Armistice, in an attempt to free POWs still in secret prison camps in North Korea. And that information still remains classified, so I'm not sure how much more I can say on that."

Over the prosecutor's objection, defense counsel then showed Swisher the just-received letter from the National Personnel Records Center. The letter was dated the day of the cross examination and had been faxed to defense counsel's office at 2:34 p.m. that afternoon. The letter was signed by Archives Technician Bruce R. Tolbert. The letter (hereinafter the "Tolbert letter") stated:

> [A] U.S. Marine Corps record was located on file at this Center for Mr. Swisher based on the information provided in your request. The USMC record shows Mr. Swisher served on active duty in the USMC from August 4, 1954 to his release from active duty on August 3, 1957. He was subsequently discharged from the USMC reserves on August 3, 1962. In addition, Mr. Swisher's Marine Corps record has been carefully examined by the Military Awards Branch of the office of the Commandant of the Marine Corps, and that office has stated that his record fails to show that he was ever recommended for, or awarded any personal decorations.

Defense counsel asked Swisher whether the letter "might refresh [his] recollection as to whether or not the Government issued [him] a Purple Heart."

After Swisher reviewed the letter, the following exchange took place:

> Q [by defense counsel]: Now, sir, when you are awarded a Purple Heart, are you not

given a document reflecting your entitlement to that Purple Heart?

A [by Swisher]: Commonly.

Q: Were you given such a document?

A: Yes.

Q: Where is that document?

A: In my pocket.

Q: May I see it, please?

A: I have a replacement DD-214, if the court will permit me to –

THE COURT: Let me take a look at it, first.

THE WITNESS: It is certified. We had to go clear to Headquarters of the Marine Corps and all over to get it. Because of the classifications, my record, along with the other survivors of that Mission, had been pretty much purged.

THE COURT: Ms. Longstreet, would you tender that to both counsel, please?

[THE PROSECUTOR]: I have a copy, Your Honor.

THE COURT: Just hang on to it.

[DEFENSE COUNSEL]: What was that?

[THE PROSECUTOR]: I have a copy.

[DEFENSE COUNSEL]: May we approach, Your Honor?

At sidebar, out of the hearing of the jury, the exchange continued:

> [DEFENSE COUNSEL]: I am going to – apparently, counsel for the government knew about the validity of the Purple Heart. He just said he has a copy of this.
>
> THE COURT: Have you seen this document?
>
> [THE PROSECUTOR]: He showed me this document this morning, about 9:00 o'clock.
>
> THE COURT: Do you have a copy of it?
>
> [THE PROSECUTOR]: I have a copy of it.
>
> [DEFENSE COUNSEL]: Why didn't you tell us?
>
> [THE PROSECUTOR]: Why should I?

Swisher had pulled from his pocket a single sheet of paper, which was a photocopy of a document purporting to be a Defense Department Form 214, described by Swisher in his testimony as a "replacement DD-214." In box 32, near the bottom of the document, was typewritten: "This document replaces the previously issued transfer document of 8-3-57. Changes and additions have been verified by Command. The original of this DD-214 has been forwarded to headquarters MC (10-15-57) . . . Entitled to wear Marine Corps Expeditionary Medal." Near the middle of the document, in box 26, was typewritten: "SILVER STAR, NAVY AND MARINE CORPS MEDAL W/ GOLD STAR, PURPLE HEART, NAVY AND MARINE

CORPS COMMENDATION MEDAL W/BRONZE 'V'." In box 27, immediately below, was typewritten: "Multiple shrapnel and gunshot – September 1955, Korea." The document bore the signature "W. J. WOODRING, Jr., Capt., USMC."

On the same page, below the photocopy of the purported Form DD-214, was written: "Filed and recorded at the request of Joe Swisher[.] At 2:40 o'clock p.m. this 2nd day of February 2004[.] *ROSE E. GEHRING*[,] Ex-Officio Auditor and Recorder Idaho County, Idaho[.] By Dana Stroop[,] Deputy[.] Fee $0[,] 1 pg." (Underlining indicates handwriting; italics indicates stamp; brackets indicate material added by me.)

The court excused the jury, and the conversation continued. The court asked the prosecutor to confirm that he had seen the document that morning at 9:00 a.m. The prosecutor replied:

> [Swisher] showed it to me at 9:00 a.m. this morning because I had asked – he had mentioned Korea, serving in Korea.
>
> I said, "Wasn't the Armistice in '52?"
>
> He said, "But there was still, you know, combat; and it continues to this day," which I happen to know to be true. There is combat to this day in Korea.

Defense counsel requested a mistrial based on the prosecutor's failure to inform the defense that Swisher had given the government a document that

appeared to contradict the letter from the National Personnel Records Center. The prosecutor responded that defense counsel "should have listened to me when I said, 'Don't go there.'" He elaborated:

> I didn't go into anything about his combat or his medals or anything else on my direct. He chose to go down this path, even when I objected to it.
>
> I didn't draw attention to the little pin in Mr. Swisher's lapel. Lots of people wear them. They could be anything. He wanted to make an issue of it.
>
> . . .
>
> Counsel whipped out his document that he received minutes ago. I believe he probably didn't have enough time to read it and digest it and tried to use that to impeach the witness. That was improper.
>
> . . .
>
> It was a grandstand play in front of the jury that didn't – that wasn't so grand, and he got caught on it. That's where we are.
>
> There is nothing the Government did that caused him to go in the area he did. We tried to avoid going into this area.
>
> I don't think – you know, I barely had time to look at this myself. It refers to other – that this replaces some document previously issued. I don't know what that

> document is, and it just led me to conclude that this is not a proper area to go into.

The court denied the motion for a mistrial, stating:

> The court finds as a matter of fact that if [Swisher's document] is a copy of a genuine military record – and at this point, I don't have any way to determine that; but it appears to be genuine, at least in appearance.
>
> It indicates consistently with how the witness has testified; that he did, in fact, receive multiple shrapnel and gunshot wounds in September 1955 in Korea; and that he was awarded commendations and medals, including the Purple Heart.

The court stated that "until the receipt of the [Tolbert] letter," the government "had no reason to believe that [Swisher's document] was discloseable under Brady or Giglio because it was not impeaching."

The court offered to "instruct the jury to strike that portion of the cross examination of Mr. Swisher that relates to the Purple Heart. Just tell them to completely disregard all testimony about the Purple Heart." Defense counsel agreed. When the jury returned, the court said:

> Ladies and gentlemen, it's been a long day; and I now realize that I made a mistake in allowing the questioning with regard to the Purple Heart Medal.

> So I am going to instruct you to disregard completely all of Mr. Swisher's testimony with regard to that military commendation.
>
> You are certainly entitled to consider all of the rest of his testimony. Just everything from where I asked [defense counsel] to reopen, please strike that from your minds; and you are not to consider it as evidence in the case.

The contretemps over the Tolbert letter and the "replacement DD-214" took place on Friday afternoon, January 14. The following Monday, January 17, was a federal holiday. When the trial resumed on Tuesday, the prosecution rested, and the defense called its first witnesses.

The next day, Wednesday, January 19, defense counsel told the court, outside the presence of the jury, that he had obtained information indicating that the document Swisher had taken from his pocket while on the witness stand – the so-called "replacement DD-214" – was fraudulent. Defense counsel had obtained a photocopy of a different Form DD-214, also recorded by Swisher at the Idaho County Auditor and Recorder's office. However, this Form DD-214 had been recorded in February 2001 rather than February 2004. The earlier-recorded Form DD-214 was identical to the later-recorded form, with the notable difference that none of the medals, commendations, or wounds was [sic] mentioned in the earlier-recorded form. "N/A" was written in box 26 where the Silver

Star, Purple Heart, and other awards were specified in the later-recorded form. "N/A" was also written in boxes 27 and 32 where, in the later-recorded form, "Multiple shrapnel and gunshot – September 1955, Korea" and "Entitled to wear Marine Corps Expeditionary Medal" were written.

Defense counsel told the court:

> [T]he indications from the people we have talked to [at the National Personnel Records Center] is that they stand by the [Tolbert] letter of January 14th and that they will provide us with a certified copy of his DD-214 that would not support [Swisher's document]; that [Swisher's document] is a forgery; and that he was never given any of the awards or benefits as indicated on [Swisher's document]; and that, further, if any change had been made in the discharge document, it would have been done on a form DD-215 [rather than a form DD-214]. . . .

Counsel further stated that he believed Swisher had not been wounded in combat but, in fact, had been "injured while in the Service in a car accident in Bremerton, Washington." He stated that the National Personnel Records Center would send Swisher's full military record to the court, but only in response to a subpoena signed by the court. The court signed a subpoena late that day.

Two days later, on Friday morning, January 21, again outside the presence of the jury, the prosecutor provided a photocopy of a letter to the court "for

in-camera review." The letter was from Lieutenant Colonel K.G. Dowling, Assistant Head of the Military Awards Branch of the Marine Corps, to Ben Keeley of the Idaho Division of Veterans Services. The letter (the "Dowling letter") was dated December 30, 2004. What appeared to be a "received" stamp was dated January 10, 2005. At the top of the Dowling letter, now in the possession of the government, was a fax line indicating that it had been faxed from the "ID. STATE VETERANS SVS" in Lewiston, Idaho, where Keeley's office was located, on Thursday, January 13, 2005. January 13 was the day before Swisher took the stand to testify against Hinkson.

The prosecution has given various answers about when it received the Dowling letter or learned of its existence. On the morning of January 21, when he gave the letter to the district court, the prosecutor stated that he "believe[d] Agent Long got [the letter] the day before by going to the Veterans' Administration." Later, in its opposition to Hinkson's motion for a new trial, the prosecution stated in its brief that the letter was "obtained by federal investigators a few days earlier from the Boise Veteran's Affairs office." In its brief to this court, the prosecution stated that "government investigators obtained [the letter] on or about January 20." Finally, in response to the queries during oral argument before the three-judge panel, the government's attorney sent a post-argument letter stating that he had "been informed that investigating agents on the prosecution team first saw and learned of the Dowling letter on January 18 or 19, at

the Boise, Idaho office of the Department of Veteran's Affairs." There is no indication in the record that defense counsel had any idea of the existence of the Dowling letter until the government provided it to the court on January 21.

The Dowling letter indicated that Keeley earlier had contacted the Personnel Management Support Branch of Marine Corps Headquarters, after Swisher attempted to use his "replacement DD-214" to obtain veterans' benefits from the Idaho Division of Veterans Services. Dowling wrote back to Keeley:

> We have thoroughly reviewed the copy of the Certificate of Release or Discharge from Active Duty (DD Form 214) and supporting letter which you submitted on behalf of Mr. Swisher with your request. The documents you provided do not exist in Mr. Swisher's official file. The official DD Form 214 in his record of the same date was signed by Mr. Swisher and does not contain any awards information in box 26, and contains no "wounds" information in box 27. A copy of his official DD 214 is provided as the enclosure. Given this information we have reason to believe that the documents you submitted are not authentic.
>
> Specifically, the DD 214 you submitted on behalf of Mr. Swisher indicates that Mr. Swisher is entitled to the Silver Star Medal, Navy and Marine Corps Medal (Gold Star in lieu of the Second Award), Purple Heart, and Navy and Marine Corps Commendation

Medal with Combat "V." However, our review of his official military records, those of this headquarters, and the Navy Department Board of Decorations and Medals failed to reveal any information that would indicate that he was ever recommended for, or awarded any personal decoration.

Additionally, the Navy and Marine Corps Commendation Medal, which is listed in block 26 of the DD 214 that you submitted did not exist at the time of Mr. Swisher's transfer to the Marine Corps Reserve in 1957. On March 22, 1950, a Metal [sic] Pendant was authorized for issue in connection with a Letter of Commendation and commendation ribbon. On September 21, 1960, the Secretary of the Navy changed the name of the award to the Navy Commendation Medal. On August 19, 1994, the Secretary of the Navy renamed the medal as the Navy and Marine Corps Commendation Medal. It is impossible that the approving officer could have signed an official document in 1957 indicating Mr. Swisher's entitlement to a personal decoration which did not exist in its present form until 1994.

Further review of Mr. Swisher's records reveals that he is not entitled to any service awards, including the Marine Corps Expeditionary Medal, for his service in the U.S. Marine Corps. Mr. Swisher's official military records failed to indicate any information that he served in Korea during the period when any awards were authorized. His

> records show that he was stationed at Camp Fuji and Yokosuka, Japan from March 4, 1955 to May 6, 1956.
>
> There is no information in his military record or his medical record to substantiate his entitlement to a Purple Heart medal. His medical records show that on February 10, 1957, he was involved in a private vehicle accident near Port Townsend, Washington.

Later on Friday, January 21, the court received Swisher's official military file – "a half-inch-thick stack of materials" – from the National Personnel Records Center in response to its subpoena. The official military file contained a copy of the Dowling letter. The government undoubtedly anticipated that the file would arrive on or about that day, and that when it arrived it would contain the Dowling letter that the government had presented to the court that morning. The presence of the Dowling letter in the file was entirely predictable, for it stated in its last paragraph: "[Mr. Swisher's] records will be returned to the National Personnel Records Center, and a copy of this letter will be filed in Mr. Swisher's official military records."

Swisher's official military file also contained a copy of Swisher's original Form DD-214. This Form DD-214 matched precisely the Form DD-214 that Swisher registered in the Idaho County Recorder's office in February 2001. This Form DD-214 showed that Swisher had never received any military awards.

Swisher's official file also contained the two documents that Keeley had sent to Dowling for evaluation. One of the documents was a copy of the "replacement DD-214" purportedly signed by Capt. W. J. Woodring, Jr. that Swisher had pulled out of his pocket on the witness stand. The other document was a letter purportedly written to Swisher by Woodring on October 16, 1957. That letter stated:

> I am pleased to inform you that your combat action, awards and citations have been verified. A copy of a replacement DD 214 transfer document, which more accurately reflects your military service, is attached to this correspondence. The original has been forwarded to the Commandant of the Marine Corps at Headquarters Marine Corps in Washington, D.C.
>
> . . .
>
> When you recover from surgery, both Major Morgan and I encourage you to enter a R.O.T.C. program at the college of your choice. Glad we were able to help.

As indicated above, the Dowling letter stated that "we have reason to believe" that both of these documents "are not authentic."

Outside the presence of the jury, the court stated – somewhat surprisingly in view of the contents of the file – that a "quick review of the file indicates that Mr. Swisher was, in fact, involved in top secret activities; and it appears that he was awarded the medals

that he claims that he was awarded. . . . [The documents] do not appear to be impeaching." The court told counsel that it would conduct a more thorough review of the file over the weekend.

When the trial reconvened on Monday, January 24, the court discussed Swisher's official military file with counsel off the record. Then, on the record and without the jury present, the court stated its conclusions. The court stated that the file had been sent to the court by the National Personnel Records Center in response to the court's subpoena; that the Dowling letter in the file matched the letter provided to the court by the prosecution on Friday; and that the Dowling letter concluded that the "replacement DD-214" and the "supporting letter" purportedly signed by Woodring were "not authentic." But the court stated that it found the file "very difficult to decipher." The court stated:

> It is not at all clear to me what the truth of the matter is; and I suspect it has something to do with the fact that we are dealing with events that occurred fifty years ago and that, at the time that they occurred, were involving top secret military activities.
>
> So I wanted you to look at it because, obviously, you have to make your own judgment as to what you think the significance of it is.

The court stated that "the problem the court had in reviewing the documents in camera is that the

documents we have, themselves, are neither self-authenticating nor self-explanatory."

The court concluded:

> And I do not want to turn this issue into a peripheral mini-trial under Rule 608(b) of the Rules of Evidence.
>
> . . .
>
> So the state of the record at this point before the jury is that the jury is not to consider Mr. Swisher's battlefield commendations, or lack thereof, although they can certainly assess his credibility with regard to the extensive cross-examination that was conducted by the defense and see how it jives with all of the other evidence in the case.

Defense counsel replied that, in light of the information now before the court, the defense deserved an opportunity to question Swisher further about his "replacement DD-214" and his military experience. Defense counsel reiterated that Swisher had worn a Purple Heart on the witness stand.

The prosecutor reminded the court that during his direct examination of Swisher he had not attempted to elicit "for the truth of the matter that Swisher was, indeed, in combat." Instead, he said, the jury heard about "a conversation . . . between Mr. Swisher and Mr. Hinkson regarding Hinkson asking him, 'Were you ever in combat?'" The prosecutor also addressed "what we call a Replica Purple Heart. It's not a real Purple Heart at all." The basis of the

prosecutor's conclusion that the lapel pin Swisher wore on the witness stand was "not a real Purple Heart at all" is not clear from the record. The prosecutor maintained to the court that, in any event, whether Swisher was "entitled to wear a Replica Purple Heart or any other kind of little medal on his lapel" was a "collateral issue that arose only on cross-examination."

Defense counsel told the court that he was "concerned about when the Government got [the Dowling letter]," which the prosecutor had provided to the court on Friday morning, January 21. The prosecutor responded, "[W]e got it – I believe Agent Long got it the day before by going to the Veterans' Administration." The prosecutor added that the Dowling letter, standing alone, did not prove that Swisher's "replacement DD-214" was fraudulent. He said:

> What they would really have to prove, if this were to be resolved, is they would have to prove that the substitute DD-214 signed by Captain Woodring, in, I believe, October '57 – . . . that the signature of Captain Woodring was forged; and I would suggest that probably would resolve whether it's correct or not.
>
> How you would prove that something that was signed in 1957 – I doubt very much Mr. Woodring is still with us, but I don't know.

The court agreed that it "was not at all convinced yet" that "the document that Mr. Swisher pulled out

of his pocket [was] false or not" because Swisher's military record was not "self-explanatory." The court stated, "I have no idea, if somebody is involved in secret military operations, whether or not their personnel file . . . would ever reflect those missions." The court stated that it needed to hear from "a records custodian from the National Personnel Records Center or someone else who is more familiar with military records and decorations than any of us."

The court ruled that the defense would be permitted to recall Swisher for further cross examination but would not be permitted to introduce into evidence any of the documents bearing on his military experience. That is, the court ruled that the defense would not be permitted to introduce the Tolbert letter, the Dowling letter, or anything else contained in Swisher's official military file that had been sent in response to the court's subpoena. The court stated:

> The documents which form the basis for the doubt cast on Swisher's military record and [his] entitlement to wear the Purple Heart are extrinsic evidence probative of a specific incident of untruthfulness.
>
> The court therefore holds that the admission of these documents is barred by Rule 608(b).
>
> . . .
>
> Furthermore, the court holds that admission of the actual documents of impeachment is barred under Rule 403.

First, the documents have not yet been officially authenticated; and this process could waste considerable time on tangential issues only indirectly related to the issues to be resolved at trial and, perhaps, submitted to the jury as early as tomorrow.

Second: The documents themselves are not entirely conclusive. They are certainly not self-authenticating. The Government would have to be allowed to introduce conflicting documents or testimony of military officers to explain them.

The proffered documents state, in summation, that Swisher's record does not indicate that he earned any service record or service medals during his military duty; however, other documents available to the court suggest that Swisher might, indeed, have earned such medals.

. . .

The defense may reference these documents during its cross-examination. . . .

In sum, the court finds that the questionability of Swisher's character for truthfulness may be amply demonstrated to the jury by re-opening cross-examination and by allowing the defense to reference the impeaching documents during the cross-examination.

. . . .

> I will let the defense decide which way they want to go; either leave it alone or call him.

The next morning, Hinkson's counsel informed the court that, given his inability to introduce into evidence the military documents showing that Swisher had lied on the stand about receiving the Purple Heart and other decorations, he had decided not to recall Swisher.

The government made several references to Swisher's military experience during closing arguments to the jury. The prosecutor began by explaining the significance of Swisher's testimony:

> The judge will further instruct you that the fourth sort of circumstance that you can consider to be strongly corroborative of Mr. Hinkson's intent to solicit murder would be the fact that an accused believed or was aware that the person solicited had previously committed similar offenses.
>
> Mr. Swisher's testimony was powerful. He talked about how Mr. Hinkson understood that Mr. Swisher had been in the military and had killed a lot of people. He was very impressed by that.
>
> In fact, according to Mr. Swisher, Mr. Hinkson asked, "Have you killed somebody?"
>
> And when Mr. Swisher says, "Yes," Mr. Hinkson's response is not, "Wow, that must be terrible," but it is, "How many people have you killed?" He was very impressed by that.

The prosecutor stated that "[a]nother reason Mr. Hinkson liked Joe Swisher and they were friends is Mr. Swisher had been in the Marine Corps. Mr. Hinkson had served in the Navy. Joe Swisher told you they talked about their experiences in the Service." The prosecutor stated later, "Mr. Swisher, I suggest to you a reasonable juror could find, told the truth about the solicitation." At the end of the government's closing, the prosecutor stated that Hinkson "understood Mr. Swisher had a military record and that he had served in combat and killed people. It's the kind of person he thinks will do such a thing."

On January 27, 2005, after two days of deliberations, the jury returned a guilty verdict on the Swisher-related solicitation counts. It acquitted or hung on all other counts.

On March 3, 2005, just over a month later, defense counsel moved for a new trial under Federal Rule of Criminal Procedure 33. The motion relied on, *inter alia*, "newly discovered evidence" that Swisher had lied under oath on the witness stand and had produced a forged document in court. That evidence consisted of a newly obtained affidavit from Chief Warrant Officer W.E. Miller, the Marine Corps liaison to the National Personnel Records Center, and a newly obtained affidavit from now-retired Colonel W.J. Woodring, Jr., the Marine Corps officer whose signature appeared on Swisher's original Form DD-214, on the purported "replacement DD-214," and on the purported "supporting letter" for the "replacement DD-214." These documents were precisely

what the district court and the government had said were needed to prove that Swisher had lied on the stand.

Chief Warrant Officer Miller stated, in an affidavit dated February 24, 2005, "As part of my duties . . . I have access to the official United States military records of former members of the USMC which are deposited in the N[ational] P[ersonnel] R[ecords] C[enter] and, among my other responsibilities, I evaluate the authenticity of information, records and documents affecting individual Defense Department transfer documents including DD Forms [sic] 214."

Miller concluded that Swisher had never been awarded a Purple Heart. He wrote that his reasons included the following:

> A. Swisher's medical records show that he did not sustain any combat wounds, rather he was involved in a private motor vehicle accident near Port Townsend, Washington on 10 February 1957 and was treated at the hospital at Bremerton, Washington. . . .
>
> B. The DD Form 214 signed by Swisher on 3 August 1957 . . . which is a part of his official U.S. military record contains a specification that he was not entitled to VA benefits[.]
>
> C. Swisher's official U.S. military record indicates that he was subject to an Article 115 disciplinary action resulting in demotion from Corporal to Private First

Class on 28 Feb. 56 which involved disobedience to military law during his active tour of duty[.]

D. Swisher's official U.S. military record shows that rather than being assigned to missions in post-War Korea (as claimed by Swisher) he was stationed at Camp Fuji and Yokosuka, Japan from 4 March to 6 May 1956 with no supporting documentation or information to indicate that he participated in any classified Marine Corps expeditionary operation that performed incursions into Korea during his tour of active duty. . . .

E. Swisher asserts that the expeditionary missions he was involved with in Korea were classified as "Top Secret" operations. The U.S. Marine Corps did not perform any classified operations or "Top Secret" operations during Swisher's tour of duty.

Miller also concluded that the "replacement DD-214" that Swisher had presented in court was not an "authentic document." (Miller referred to this document as "Exhibit C.") In addition to the factors enumerated in support of his conclusion that Swisher was not entitled to a Purple Heart, Miller wrote:

A. Military Rules and Procedures require that a DD Form 214 can only be issued and retyped at the Headquarters of the USMC and signed by a designee of the Commandant of the Marine Corps who

offices at Headquarters. Capt. Woodring never held such designation.

B. Exhibit C, in box 32 provides: "*[t]his document replaces the previously issued transfer document of 8-3-57.*" There are no additional records in Swisher's file that support the claim that Swisher's original DD Form 214 was replaced;

C. Exhibit C, box 32, provides: "*[c]hanges and additions have been verified by Command.*" Changes or additions in Swisher's original DD Form 214 if truly "*verified by Command*" would have resulted in verification documents becoming a part of Swisher's official U.S. military record. . . .

. . .

G. Military policy and procedure which has been in effect since before the time of Swisher's transfer from active duty to the USMC Reserves on 3 Aug. 57 would have directed the issuance of a DD Form 215 first, before any replacement version of Swisher's original DD Form 214 would have been issued. . . .

H. There is no record of a DD Form 215 ever having been issued for Swisher.

(Emphasis and brackets in original.)

Now-retired (and, to the government's surprise, still living) Marine Corps Colonel W.J. Woodring, Jr., in an affidavit dated February 27, 2005, stated:

> 2. I spent 35 years 6 months in the United States Marine Corps. I was a Captain in the Marine Corps in 1957. I am now retired and I reside in Southern California.
>
> 3. I have reviewed Exhibit A attached which purports to be a copy of a letter addressed to Pfc Elven Joe Swisher (Swisher) dated 16 Oct 1957. I did not write or cause Exhibit A to be written. Below the words Semper Fidelis, there is handwriting that purports to be my signature. I did not sign Exhibit A. What looks like my signature on Exhibit A is actually the image of my signature that has somehow been superimposed upon the letter. Exhibit A is a forgery.
>
> 4. I have reviewed Exhibit B attached which purports to be a copy of a "Replacement DD 214" for Swisher. In box 34b there is handwriting that purports to be my signature. I did not sign Exhibit B. What looks like my signature on Exhibit B is actually the image of my signature that has somehow been superimposed upon the letter. Exhibit B is a forgery.

On April 22, 2005, the court denied Hinkson's motion for a new trial. Applying the criteria set forth

in *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003), the court gave several reasons for declining to grant a new trial on the basis of Hinkson's newly discovered evidence. First, the court concluded that Hinkson had not been diligent in seeking the evidence he now submitted to the court. Second, the court concluded that the evidence was not "newly discovered" because "[t]he substance of both proffered documents is not new and is generally cumulative of previously available information." Finally, "[m]ost importantly," the court concluded that "the proffered 'new' evidence is not material to the issue at trial, nor would a new trial probably result in an acquittal, because the evidence is inadmissible." The court explained that it had "previously held on the record at trial . . . and now reiterates, admission of the proffered documents and testimony is still prohibited by Fed. R. Evid. 608(b), which bars introducing extrinsic evidence of the witness's past conduct."

Hinkson was sentenced on June 3, 2005, for his solicitation convictions as well as for his tax evasion and currency structuring convictions. He received a total of 43 years in prison: ten years on the tax and structuring charges, ten years on each of the three solicitation charges, and an additional three years for having made the solicitations while on pretrial release in the tax case.

II. Subsequent Indictment and Conviction of Swisher

On July 30, 2007, the government indicted Swisher for knowingly wearing military decorations to which he was not entitled, including the Purple Heart, in violation of 18 U.S.C. § 704(a); for willfully and knowingly making false representations about his military service in order to obtain benefits to which he was not entitled, in violation of 18 U.S.C. § 1001(a)(2); and for presenting false testimony and a "forged form DD-214" in order to obtain benefits to which he was not entitled, in violation of 18 U.S.C. §§ 641 and 642. As the date of the indictment makes clear, the government indicted Swisher more than two years after the district court ruled on Hinkson's motion for a new trial. On April 11, 2008, Swisher was convicted on all three counts of the indictment. Because Swisher's indictment and conviction did not occur until after the district court ruled on Hinkson's motion for a new trial, the district court obviously could not have considered them in reaching its decision.

III. Appeal

On appeal to this court, Hinkson challenges the denial of his motion for a new trial on three grounds. First, Hinkson argues that the district court erred in precluding him from introducing into evidence the military documents that would have shown that Swisher lied about his Purple Heart, about his other decorations, and about his forged "replacement

DD-214." Second, Hinkson argues that the prosecution engaged in misconduct by referring to Swisher's military background during its closing argument after it was clearly on notice of the contents of Swisher's official military file. Third, Hinkson argues that he is entitled to a new trial based on the new evidence presented in his post-trial motion under Rule 33. I would reach only the first and third arguments. I agree with both of those arguments and would reverse the district court based on either of them.

A. Refusal to Admit Impeaching Military Documents into Evidence

We review for abuse of discretion a district court's evidentiary rulings, including decisions to admit or exclude impeachment evidence. *United States v. Tran*, 568 F.3d 1156, 1162 (9th Cir. 2009); *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002). We must then apply the harmless error standard. We will reverse an evidentiary ruling for abuse of discretion "only if such nonconstitutional error more likely than not affected the verdict." *United States v. Edwards*, 235 F.3d 1173, 1178-79 (9th Cir. 2000); *see also* Fed. R. Crim. P. 52(a) ("Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

Hinkson sought to introduce the Tolbert letter, the Dowling letter, and the rest of Swisher's official military file in order to show that Swisher lied about receiving the Purple Heart and his other claimed

military decorations, and to show that he had forged his so-called "replacement DD-214" that he had brandished before the jury. The district court excluded this evidence based on Federal Rules of Evidence 608(b) and 403.

Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The district court deemed the documents bearing on Swisher's military experience "extrinsic evidence probative of a specific incident of untruthfulness" and therefore inadmissible under Rule 608(b).

The district court erred as a matter of law in holding that the Tolbert letter, the Dowling letter, and the other documents in Swisher's file could be excluded under Rule 608(b). The 2003 Advisory Committee Notes to Rule 608 make clear that "the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence

is to attack or support the witness' character for truthfulness." Fed. R. Evid. 608(b), advisory comm. notes (2003). Hinkson did not seek to introduce those documents for the sole "purpose of attacking . . . the witness' character for truthfulness." Rather, Hinkson sought to introduce the documents for the specific purpose of contradicting in-court testimony by Swisher. Such evidence is governed by Rule 607, which "permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999).

Swisher took the witness stand wearing a Purple Heart lapel pin, thereby affirmatively stating that he had been wounded in combat while serving in the United States armed forces. Rule 801(a) provides, "A 'statement' is . . . nonverbal conduct of a person, if it is intended by the person as an assertion." Recall that in his opening statement to the jury three days before, the prosecutor had described Swisher as "a Combat Veteran from Korea during the Korean conflict [who] was not adverse to . . . violent, dangerous activity." Particularly given the prosecutor's statement, the jury could hardly avoid understanding Swisher's wearing of the Purple Heart as "non-verbal conduct . . . intended . . . as an assertion" that he had been wounded in military combat. The documents Hinkson sought to introduce would have directly contradicted that statement, and would have shown Swisher to be a liar.

The district court also erred by refusing to allow Hinkson to introduce this extrinsic evidence to impeach Swisher based on Rule 403. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The district court abused its discretion by concluding that it would be unduly time-consuming and confusing to the jury to admit the official military documents showing that Swisher lied about receiving a Purple Heart, and that, when challenged, he lied about having a so-called "replacement DD-214." Although some parts of Swisher's military record may have been difficult for a lay jury to understand, other parts were easy to comprehend. For example, the Dowling letter was clearly written and unambiguous. It stated simply and directly that Swisher had not been in combat and had not been awarded any medals. Other documents in Swisher's official military file – which had been sent to the court pursuant to its subpoena and whose authenticity was not in doubt – unambiguously showed that Swisher's "replacement DD-214" was a forgery. Given Swisher's crucial role in the government's case against Hinkson, the time it would have taken to admit this evidence could hardly have outweighed its probative value.

The district court's refusal to allow Hinkson to admit this documentary evidence was not a harmless error. Swisher was the government's principal witness on the only counts on which Hinkson was convicted. The jury would have formed a significantly different impression of Swisher's credibility if Hinkson had been permitted to introduce evidence that Swisher lied about his military record on the stand. For the reasons I describe in detail below, this would have called into serious doubt all of Swisher's testimony, including his statements describing his interactions with Hinkson.

B. New Evidence Produced in Support of Motion for New Trial

Hinkson's motion for a new trial asserted that the Miller and Woodring affidavits, newly obtained after trial, proved conclusively that Swisher had presented false testimony and had presented a forged document during trial. The government no longer disputes that Swisher lied about his military experience and presented a forged "replacement DD-214." It contends, however, that the newly obtained Miller and Woodring affidavits do not warrant a new trial.

We review for abuse of discretion a district court's denial of a motion for a new trial based upon newly discovered evidence. *See, e.g., United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995). A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous

findings of fact, or when we are left with "a definite and firm conviction that the district court committed a clear error of judgment." *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007) (internal quotation marks omitted).

Under *United States v. Harrington*, 410 F.3d 598 (9th Cir. 2005), a criminal defendant must satisfy a five-part test in order to prevail on a motion for a new trial:

> "(1) [T]he evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal."

Id. at 601 (quoting *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991)). The district court applied this *Harrington* test, citing *Waggoner*, 339 F.3d at 919.

What we today call the *Harrington* test is sometimes referred to as the "*Berry* rule," named for the nineteenth-century case from which it derives. *See* 3 Charles Alan Wright et al., *Federal Practice and Procedure* § 557, at 541 (3d ed. 2004) (citing *Berry v. State*, 10 Ga. 511, 527 (1851)). Although we ordinarily state the test as comprising five requirements, we have recognized that requirements (3), (4), and (5) are

duplicative. That is, newly discovered evidence is "material" when the result of the newly discovered evidence is that "a new trial would probably result in acquittal," a condition that is not usually met when the newly discovered evidence is "cumulative [ ]or merely impeaching." *See, e.g., United States v. Krasny*, 607 F.2d 840, 845 n.3 (9th Cir. 1979) (noting that the materiality and probability requirements "are really two means of measuring the same thing"); *United States v. Davila*, 428 F.2d 465, 466 (9th Cir. 1970) (per curiam) (noting that newly discovered impeachment evidence supports a new trial if "it is likely that the jury would have reached a different result" in light of the evidence); *see also* Wright et al., *supra*, § 557, at 552.

The character of the defendant's newly discovered evidence determines how strictly we apply the *Harrington* probability requirement. Our usual rule is that newly discovered evidence does not entitle a defendant to a new trial unless the evidence indicates that it is more probable than not that the new trial will result in acquittal. This rule applies to most newly discovered evidence, including newly discovered evidence tending to show that evidence presented at the defendant's trial was false. *See Krasny*, 607 F.2d at 842.[1]

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[1] We have sometimes applied a less demanding standard for granting a new trial where it is known conclusively at the time of the new trial motion that the evidence presented at trial was false. *See Hall v. Dir. of Corr.*, 343 F.3d 976 (9th Cir. 2003);

(Continued on following page)

I would conclude that Hinkson has satisfied all five parts of the *Harrington* test. To my surprise, the majority concludes that Hinkson has satisfied *none* of them.

1. Newly Discovered Evidence

Under the first part of the *Harrington* test, we must determine whether the evidence presented in support of the motion for a new trial is "newly discovered." Hinkson's new trial motion relied on two new pieces of evidence: (1) the affidavit from Chief Warrant Officer Miller, the Marine Corps liaison to the National Personnel Records Center; and (2) the affidavit from Colonel Woodring, the officer whose purported signature appeared on Swisher's "replacement DD-214" and "supporting letter." It is undisputed that neither piece of evidence was known to, or was in the possession of, the defense until after Hinkson's trial had concluded.

The majority concedes that both the Miller and Woodring affidavits are "newly written" evidence, but it contends that the affidavits "did not provide any new *information* that was not already considered and rejected from evidentiary admission by the court." Maj. Op. at 14981. In other words, the majority

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Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002); *United States v. Young*, 17 F.3d 1201 (9th Cir. 1994). Because I would hold that Swisher is entitled to a new trial under the *Harrington* test, it is unnecessary to apply this test.

concludes that the evidence contained in the documents is merely cumulative of evidence that was already known during trial. That argument is best addressed to the third *Harrington* requirement, and I address that argument in detail below. I respond only briefly here.

The majority's conclusion would be more persuasive if the district court had not indicated clearly during trial that, in its view, the evidence then before it was insufficient to show that Swisher had lied about his military record. After reading the half-inch-thick file received on January 21 from the National Personnel Records Center, which included the Dowling letter, the district court stated, "It is not at all clear to me what the truth of the matter is." The court indicated that the file was "very difficult to decipher" and not "self-explanatory." The court stated that it could not resolve its uncertainty without "hearing from" a military "records custodian" or similar person. The prosecutor added that what was needed in order to show the falsity of the "replacement DD-214" was an affidavit from Colonel Woodring stating that his signature had been forged.

As I will discuss in more detail below, the newly provided Miller and Woodring affidavits were precisely the evidence that the district court and the prosecutor on January 21 had described as fatally lacking. If the district court had not explicitly stated that evidence of the sort provided by the Miller and Woodring affidavits was needed to "decipher" Swisher's file and to determine the truth, the majority's

conclusion that this evidence is merely cumulative might be understandable. But the district court's explicit statement that it needed precisely this evidence makes it is impossible to conclude that the "substance" of the Miller and Woodring affidavits was not new.

2. Diligence

Under the second part of the *Harrington* test, we ask whether the failure to discover the evidence sooner resulted from a "lack of diligence on the defendant's part." *See Kulczyk*, 931 F.2d at 548. A court cannot conclude that a defendant lacks diligence merely because a defense team with unlimited time and resources might have managed to discover the evidence sooner. Instead, a court must ask whether it was unreasonable for the defense to have failed to discover the evidence more promptly. "All that is required is ordinary diligence, not the highest degree of diligence." 3 Wright et al., *supra*, § 557, at 559-60.

The district court concluded that Hinkson had not been sufficiently diligent in discovering the new evidence. It wrote, "[T]he Court finds that Defendant is unable to establish that the failure to discover this evidence was not due to his counsel's lack of diligence. . . . [T]he Court finds that defense counsel had ample time to investigate Swisher's record prior to trial, but was not diligent in pursuing the issue."

In support of its conclusion that Hinkson had not been diligent, the district court pointed out that

Swisher had testified to receiving "battlefield injuries" from his military service during an October 11, 2004, deposition in a civil suit involving Swisher and Hinkson. Hinkson was represented in that suit by Wesley Hoyt, one of the two attorneys representing him in his criminal case. In further support of its conclusion, the district court pointed out that Swisher had discussed his purported war injuries even before the deposition, during his grand jury testimony on April 16, 2002, and February 10, 2004.

Swisher's deposition in the civil case took place just three months before the start of Hinkson's criminal trial. That was the first time Hinkson was put on notice of Swisher's claimed "battlefield injuries."

It is true, as the district court wrote, that Swisher gave grand jury testimony in 2002 and early 2004. But this meant only that the *government* knew about Swisher's grand jury testimony, and thus the *government* was put on notice in 2002 and 2004 of his claimed "battlefield injuries." As the district court knew or should have known, precisely because it was grand jury testimony, that testimony was kept secret from Hinkson. The government finally turned Swisher's grand jury testimony over to Hinkson pursuant to the Jencks Act on January 4, 2005, only one week before trial.

Thus, the first time Hinkson was put on notice of Swisher's claimed battlefield injuries was on October 11, 2004. On January 14, 2005, when Hinkson's counsel sought to reopen his cross examination of

Swisher in order to question him about the Tolbert letter, counsel stated to the court, "For quite sometime [sic], we have been trying to dig into his military history because we don't believe it's accurate." Then, after Swisher pulled the "replacement DD-214" out of his pocket, Hinkson's counsel stated at the sidebar that the defense had "been trying to get Mr. Swisher's military records *for about ninety days*; and we have very little control over when that happens." (Emphasis added.) January 14 is ninety-five days after October 11.

Thus, we know from the uncontradicted trial transcript that Hinkson's counsel tried to obtain Swisher's military record immediately after his October 11 deposition. We also know that government authorities, over whom defense counsel had "very little control," were slow to respond. The government did not provide anything to Hinkson until it provided the Tolbert letter on the very day of Swisher's testimony. The government can hardly claim that Hinkson was not diligent when his counsel sought the information immediately after Swisher's October 11 deposition, and it was the *government* that took ninety days to respond.

In my view, Hinkson's counsel were diligent in looking for evidence that could be used to impeach Swisher. Indeed, they were successful in finding such evidence. As a result of their efforts, defense counsel received the Tolbert letter from the National Personnel Records Center while Swisher was still on the stand. The letter recounted that Swisher did not

enter active duty until 1954. It stated that "Swisher's Marine Corps record has been carefully examined by the Military Awards Branch . . . , and that office has stated that his record fails to show that he was ever recommended for, or awarded any personal decorations."

Hinkson's counsel reasonably viewed the Tolbert letter as exactly the sort of impeaching evidence it had been seeking. Counsel hoped that Swisher, when confronted with the letter, would be forced to admit that he was not the decorated combat veteran he purported to be. Counsel could hardly have anticipated that Swisher, after being shown the letter, would pull from his pocket a forged document purporting to provide a superseding account of his military service. Until that moment, there was little reason for the defense to suspect the existence of Swisher's "replacement DD-214," let alone to suspect that the document was a forgery.

After learning of the "replacement DD-214" on Friday, January 14, the defense was quick to investigate its authenticity. On Wednesday, January 19, following a long holiday weekend, defense counsel informed the court that they had learned that Swisher had recorded two different DD-214 forms with Idaho County, and that the earlier-recorded DD-214 was "devoid of any . . . honors and medals." Counsel also stated that they had spoken to staff at the National Personnel Records Center who stated that the Center stood by the conclusions of the Tolbert letter but would not release additional documents about

Swisher without a subpoena from a judge. The court agreed to subpoena Swisher's military file, which arrived two days later, on Friday, January 21.

The court kept Swisher's military file to review over the weekend, and then disclosed it to counsel on Monday, January 24, the last full day of testimony before closing arguments. The court ruled that it would allow the defense to recall Swisher for further cross examination, but would not allow the defense to introduce into evidence any of the military documents obtained. The court stated further that it did not want to conduct a mini-trial during which the government would put experts on the stand to explain the documents. Once Hinkson's trial concluded, the defense was diligent in obtaining the evidence from Woodring and Miller. It filed its motion for a new trial just over one month after the conclusion of trial. *See* Fed. R. Crim. P. 33(b)(1) (providing that motions for a new trial "grounded on newly discovered evidence must be filed within 3 *years* after the verdict" (emphasis added)).

The government had its own duty to investigate Swisher's military record, having been alerted to "the real possibility of false testimony." *Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001). Because the government had participated in the grand jury proceedings, it knew long before Hinkson's counsel that Swisher had given potentially false testimony about his military experience. Swisher's first grand jury testimony was in April 2002. This was two years and three months

before Swisher's deposition, and two years and sixth months before Hinkson's trial. During this period, if it had wished to do so, the government could easily have obtained Swisher's official military file to determine whether its star witness was telling the truth. But so far as the record shows, the government made no effort to do so.

The government now argues that Hinkson was not diligent in investigating Swisher's military record. But for two and a half years, it was the *government* that made virtually no effort to investigate the trustworthiness of its star witness. Further, it was the *government* that took ninety days to respond to Hinkson's request immediately after Swisher's October 11 deposition for information about his military record. Yet the government now has the nerve to argue that it was *Hinkson* who was not diligent. It is almost incomprehensible to me that the government would make that argument. It is entirely incomprehensible that the majority would accept it.

3. Material to the Issues at Trial

The third part of the *Harrington* test requires that the newly discovered evidence be "material to the issues at trial." In the context of a new trial motion under *Harrington,* materiality has a special meaning. Materiality under *Harrington* does not require that the evidence in question would have been material at the original trial. Rather, materiality under *Harrington* requires that the evidence

in question will materially alter the result on *retrial*. In many cases, there will be little or no practical difference. *See, e.g., United States v. George*, 420 F.3d 991, 1001 (9th Cir. 2005) (analyzing materiality in terms of the first trial). But the *Harrington* test is clearly framed in terms of what will happen on retrial rather than what happened at the original trial. *See Harrington*, 410 F.3d at 601 ("[T]he evidence must indicate that a new trial would probably result in acquittal."); *see also Krasny*, 607 F.2d at 844 ("Yet, we have always required a showing that the new evidence would 'probably' result in an acquittal upon a new trial."); *id.* at 845 n.3 (explaining that materiality and probability "are really two means of measuring the same thing"). As I discuss below, in addressing *Harrington*'s fifth requirement, I conclude that the newly discovered evidence of Swisher's fabrications makes it probable that a new trial will result in acquittal. Thus, I also conclude that the new evidence is material under *Harrington*.

The majority relies on evidentiary rulings made by the district court. It notes that the district court held that documents showing that Swisher lied about his military record were inadmissible under Federal Rule of Evidence 608(b). The majority further notes that the district court excluded the evidence under Rule 403. As discussed above, the district court's evidentiary ruling under Rule 608(b) was wrong as a matter of law, and its ruling under Rule 403 was an abuse of discretion. The majority does not merely hold (erroneously) that the evidence was correctly

excluded by the district court. It goes further, suggesting that because the district court properly excluded the impeaching documents from evidence under Rules 608(b) and 403, these documents could have no material effect on retrial. Even if this were true, this is irrelevant under *Harrington*. The materiality test under *Harrington* is not whether the newly discovered evidence – the Miller and Woodring affidavits – would have been admissible during Hinkson's first trial. The test is whether the newly discovered evidence would probably result in acquittal *on retrial*.

As I discuss in detail in part five of the *Harrington* test, I conclude that the Miller and Woodring affidavits would probably result in acquittal on retrial. The affidavits would not have to be admitted into evidence to have this effect. The government has now conceded that Swisher lied about his military record, that he did not engage in combat, that he did not earn the Purple Heart he wore on the witness stand, that he did not earn any of the other military records to which he claimed he was entitled, and that he brandished a forged "replacement DD-214" in front of the jury. Both sides now know the truth. If Swisher takes the stand and is asked about his military record, and if he is asked whether he lied under oath about that record at the first trial, the truth will necessarily come out. There are two alternatives. If Swisher tells the truth, the truth will come out through his testimony. If Swisher lies, the government will have a professional obligation to correct the

record and to disown the testimony of its star witness.

4. Neither Cumulative nor Merely Impeaching

The fourth part of the *Harrington* test requires that the new evidence be "neither cumulative nor merely impeaching."

a. Cumulative

The district court concluded that "[t]he substance of both proffered documents is not new and is generally cumulative of previously available information." The "previously available information" to which the court referred consists of the documents that came to light at three different points during the trial: first, the Tolbert letter used by defense counsel to cross examine Swisher on January 14; second, the Dowling letter, which the prosecution gave to the court on the morning of January 21 and which the court also received later that day as part of Swisher's official military file; and third, the remainder of Swisher's official military file, which the court received on the afternoon of January 21.

During trial, the district court concluded that these documents established neither that Swisher's testimony was false nor that the "replacement DD-214" was fraudulent. On Monday, January 24, after reviewing Swisher's military file, including the Dowling letter, over the weekend, the court told

counsel outside the presence of the jury that it found the file "very difficult to decipher," and stated that "the truth of the matter" was "not at all clear." The court told counsel that the documents in the file were "neither self-authenticating nor self-explanatory" and did "not conclusively decide the issue." The court concluded that it was "not at all convinced" that it had enough evidence to "resolve the question of whether or not the document that Mr. Swisher pulled out of his pocket is false or not."

The district court stated that it remained uncertain about the truthfulness of Swisher's testimony and the authenticity of the "replacement DD-214," despite the fact that Swisher's military file was a government record that the court itself had subpoenaed, and despite the fact that the file contained the Dowling letter. The Dowling letter, written by an officer in the Headquarters of the U.S. Marine Corps, stated in plain language that Swisher had not earned any personal military commendations and that the "replacement DD-214" was a forgery. Another fact-finder may have found this evidence sufficient to show that Swisher was a forger and a liar. But the district court was explicit in saying that it found that the evidence then before it was inconclusive.

The district court stated that "the only way" to resolve the uncertainty surrounding the "silent file" would be to hear from "a records custodian from the National Personnel Records Center or someone who

is more familiar with military records and decorations than any of us." The prosecutor agreed with the court's assessment and added:

> What [the defense] would really have to prove, if this were to be resolved, is that . . . the substitute DD-214 signed by Captain Woodring, in, I believe, October '57 – that . . . the signature of Captain Woodring was forged; and I would suggest that probably would resolve whether it's correct or not.
>
> How you would prove that something that was signed in 1957 – I doubt very much Mr. Woodring is still with us, but I don't know.

Precisely the additional evidence the court said was lacking was supplied by Hinkson in his motion for a new trial in the form of an affidavit from Chief Warrant Officer Miller. Miller is the U.S. Marine Corps Liaison Officer to the National Personnel Records Center. His job is to "evaluate the authenticity of information, records and documents affecting individual Defense Department transfer documents including DD Forms 214." Miller concluded, after a thorough investigation, that the replacement DD-214 was a forgery and that Swisher had not earned a Purple Heart or any other personal commendation.

Similarly, precisely the additional evidence the prosecutor said was lacking was supplied in the form of an affidavit from the now-retired Colonel Woodring. As it turned out, Colonel Woodring is (to use the prosecutor's words) "still with us." Colonel

Woodring stated unequivocally in his affidavit that his signatures on both the purported 1957 letter to Swisher and the replacement DD-214 were forgeries.

In sum, the court stated at trial that the evidence before it was insufficient to allow it to determine the truth or falsity of Swisher's evidence. Defense counsel then presented to the court, in support of the motion for a new trial, precisely the additional evidence the court and the prosecutor said was needed to resolve the uncertainty. In this circumstance, this new evidence cannot possibly be considered cumulative.

The majority concludes that the Miller and Woodring affidavits are cumulative because "Hinkson's attorney had already proffered evidence that such 'Replacement DD-214' form was a forgery, in the form of the Tolbert and Dowling letters." Maj. Op. at 14983-84. The majority would be on firmer ground in so concluding if the district court had agreed with this statement. However, the district court was very clear in saying precisely the opposite of what the majority now says. As I have just explained, the district court concluded that Swisher's entire personnel file, including the Tolbert and Dowling letters, was insufficient to "establish that the replacement DD-214 was a forgery and that Swisher had lied about receiving military awards." Given the district court's view of the evidence then available, it is impossible to conclude that the Miller and Woodring affidavits are cumulative.

b. Merely Impeaching

Impeaching evidence may properly support a motion for a new trial under Rule 33. Indeed, we have expressly rejected the proposition that "impeachment evidence . . . is *never* sufficient to warrant a new trial under Fed. R. Crim. P. 33." *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992) (emphasis in original); *see also United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), *as amended* (concluding that new evidence impeaching the government's central witness was sufficiently powerful to require a new trial); *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991) (explaining that the prohibition on using impeachment evidence to secure a new trial should not be "taken at face value"); *Balestreri v. United States*, 224 F.2d 915, 917 (9th Cir. 1955) ("To deny in every case a motion for a new trial on the ground of newly discovered evidence for the sole reason that the evidence was 'merely impeachment' might often lead to injustice.").

We recognized in *Davis* that enforcing a per se prohibition on impeachment evidence as the basis for a new trial would be inconsistent with the spirit of Rule 33, which "permits the granting of a new trial motion 'if required in the interest of justice.'" *Davis*, 960 F.2d at 825. A per se prohibition would also be inconsistent with our longstanding refusal to draw a "categorical distinction between types of evidence." *Taglia*, 922 F.2d at 415; *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (refusing to distinguish between exculpatory and impeachment

evidence in the *Brady* context); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (refusing to distinguish between exculpatory and impeachment evidence in cases involving prosecutorial misconduct). Accordingly, we recognized in *Davis* that sometimes,

> newly-discovered impeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness' testimony totally incredible. In such a case, if the witness' testimony were uncorroborated and provided the only evidence of an essential element of the government's case, the impeachment evidence would be 'material' under [the *Harrington* test].

960 F.2d at 825; *see also Taglia*, 922 F.2d at 415 (holding that a new trial would be warranted under Rule 33 if it were discovered after trial that the government's star witness was "utterly unworthy of being believed because he had lied consistently in a string of previous cases"); 3 Wright et al., *supra*, § 557, at 560, 563 (noting that impeachment evidence is usually "not sufficient to justify a new trial," but that this is not an "invariable rule," and "in flagrant cases it may suffice").

In denying Hinkson's motion for a new trial, the district court wrote that "the proffered evidence [*i.e.*, the Miller and Woodring affidavits] is impeachment evidence and so is not a valid basis for a new trial." It is apparent from this statement that the district court believed mistakenly that, as a matter of law, impeachment evidence may never provide the basis

for a new trial. As just discussed, our cases do not so hold.

The majority concludes that the Miller and Woodring affidavits are impeaching and therefore cannot satisfy the fourth requirement of *Harrington*. It writes, "[E]videntiary admission of the extrinsic Miller and Woodring affidavits would serve no purpose other than to impeach Swisher's testimony as to his military record rather than his testimony as to Hinkson's solicitations." Maj. Op. at 14984. The majority mistakes the nature of the Miller and Woodring affidavits. They are powerful enough to permit a jury to conclude that Swisher's testimony inculpating Hinkson – the only uncorroborated testimony implicating Hinkson on the three counts for which the jury convicted him – was "totally incredible."

5. Probability of Acquittal on Retrial

The fifth *Harrington* requirement is that "the new evidence must indicate that a new trial probably would result in acquittal." I conclude that this new evidence would probably result in acquittal at retrial. I so conclude after comparing the evidence presented at trial on the three solicitation counts on which Hinkson was acquitted, and the three counts on which he was convicted.

I apologize for the length of the discussion that follows, but it is unavoidable. A judge who is asked to decide whether "a new trial probably would result in

acquittal" necessarily must examine carefully the evidence that was presented in the first trial, and, as a corollary, the evidence that is likely to be presented in the second trial. A judge ruling on a new trial motion may choose not to describe that evidence in detail, but he or she must necessarily consider it. Given the nature and importance of this case, I describe it in detail so that the reader may understand the basis for my conclusion.

Three solicitations to murder were charged in Counts 1 through 3 of the indictment. In these counts, the government charged that Hinkson had solicited James Harding "in or about January 2003" to murder Cook (Count 1), Hines (Count 2), and Lodge (Count 3). The jury acquitted Hinkson on all three of these counts.

Three more solicitations were charged in Counts 4 through 6. In these counts, the government charged that Hinkson had solicited James Harding "on or about March 17, 2003" to murder Cook (Count 4), Hines (Count 5), and Lodge (Count 6). The jury deadlocked on these three counts.

Three more solicitations were charged in Counts 7 through 9. In these counts, the government charged that Hinkson had solicited Swisher "between about December 2002 and February 2003" to murder Cook (Count 7), Hines (Count 8), and Lodge (Count 9). The jury returned a verdict of guilty on these counts.

Finally, two threats to commit murder were charged in Counts 10 and 11. In these counts, the

government charged that Hinkson made statements to Anne Bates in which he threatened to murder the children of Cook (Count 10) and the children of Hines (Count 11). The jury acquitted Hinkson on these counts.

The issue at trial was not whether Hinkson asked Harding and Swisher to kill Cook, Hines, and Lodge. The evidence was persuasive that he had done so. The issue was whether Hinkson had been serious in his requests. That is, the issue was whether he had an actual "intent" that Cook, Hines, and Lodge be killed, which was required under 18 U.S.C. § 373(a). Only if Hinkson was serious in soliciting the murder of Cook, Hines, and Lodge – that is, only if he had an actual intent that they be killed – did he commit a criminal offense.

The jury acquitted Hinkson outright on three of the nine counts charging solicitation in violation of § 373(a). On these three counts, the jury concluded that the government had not shown that Hinkson had been serious in soliciting murder on that occasion. The jury could not make up its mind on three more of the counts, unable to conclude unanimously that Hinkson had been serious in soliciting murder on that occasion. The jury was able to conclude unanimously only on three counts – Counts 7-9, the counts involving Swisher – that Hinkson had been serious in soliciting murder. To assess the likelihood of an acquittal on retrial on the three Swisher-related counts (Counts 7-9), I compare the evidence on the

three Harding-related counts (Counts 1-3) on which Hinkson was granted an outright acquittal.

More than half of the trial testimony provided background evidence for all of the counts charged in the indictment. This background evidence showed that Hinkson owned and operated a lucrative business called WaterOz in Grangeville, a small town in Idaho. WaterOz bottled water into which had been dissolved, by a secret process supposedly invented by Hinkson, very small particles of minerals such as gold and platinum. According to Hinkson, the water has marvelous medicinal properties. Hinkson advertised and sold his magic water over the Internet.

Hinkson did not pay federal income tax, on the asserted ground that he was not legally obligated to do so. (In a separate appeal, our three-judge panel affirmed Hinkson's criminal conviction on his tax and currency structuring offenses.) Hinkson was unstable and paranoid. He was continually worried that people, including government officials and his own employees, were trying to take WaterOz from him. After Cook and Hines participated in an early-morning raid of his home in November 2002, Hinkson repeatedly claimed that they had tried to murder him. Hinkson also repeatedly claimed that an attorney named Dennis Albers, who previously had represented a plaintiff in a successful suit against him, was trying to murder him.

Hinkson developed grudges easily and held them tenaciously. He had a special dislike for employees of

the federal government. Sometimes his talk was somewhat comical. For example, he talked to James Harding about a "fed-a-pult" and a "fed-guard." According to Harding, a "fed-a-pult" was a device to catapult federal agents into a canyon or into an oncoming train. A "fed-guard" was something to put "on the front of your car like a cattle guard." Sometimes his talk was not comical at all. For example, the evidence at trial showed that Hinkson asked multiple people, on multiple occasions, to kill Cook, Hines, and Lodge, and that Hinkson repeatedly said he wanted to torture and kill people, including Cook's and Hines's children.

a. Evidence Supporting Counts 1-3

Counts 1 through 3 charged that in January 2003 Hinkson solicited James Harding to kill Cook, Hines, and Lodge. As noted above, the jury acquitted Hinkson on these counts.

The evidence supporting Counts 1 through 3 was as follows. In November or December 2002, Harding and Anne Bates met Hinkson at a "health forum" in Southern California. At that time, Harding was a restaurant manager in Southern California. Previously Harding had been a bodyguard and had worked "in the entertainment field." He had most recently "hosted" radio shows on "the paranormal"; before that his radio work had been "comedy shows, morning shows, afternoon drive, entertainment." His last radio work was three years before he testified.

After the "health forum," Hinkson, Harding, Bates, and several others went out to eat. During the meal, Hinkson offered Bates a job at WaterOz. Harding and Bates drove to Grangeville at the beginning of January 2003 and stayed at Hinkson's house.

On the second night of Harding and Bates's stay, Harding was sitting at the kitchen table. Bates was nearby. Harding testified that Hinkson handed him "a large sum of money." Harding responded with a crude joke: "Who do I have to blow?" According to Harding, Hinkson responded "something like, 'It's not who you have to blow but who you have to kill.'" Harding testified, "I could make this much money killing [Cook, Hines, and Lodge]. He had also a wad with him of some sort; and that was supposed to be another $10,000. There was a $10,000 flat fee, and this was a wad of $10,000." Harding testified that Hinkson then "pulled back . . . and it became a joke." But, Harding testified, "I assumed that I was being tested." He testified further, "And when the $10,000 came up, I thought this was his test."

Bates, who was also in the kitchen, testified about the episode.

> We were at the table in the kitchen. . . . He was saying something along the lines that he would like some of these people dead, and he had a lot of money that he produced from somewhere. And I don't know if – maybe in a joking manner, he offered it to J.C. [*i.e.*, Harding] and said, you know, "Whoever does

> this, this is theirs," something along those lines from what I can remember.

The prosecutor asked: "Did he say it was a joke?" She answered, "He did not say it was a joke, no."

Bates remained in Hinkson's house in Grangeville, but Harding went back to Southern California to bring Bates's things back in a U-Haul truck. On Harding's return he again stayed in Hinkson's house, "probably" during the second week of January. Harding testified as follows:

> Q. Did you have any further discussions with Mr. Hinkson where he talked about these three feds, federal officials?
>
> A. Every time I talked to Dave. That was on his mind every time when we talked on every occasion.
>
> Q. Did that happen on the second occasion?
>
> A. Absolutely, yes.
>
> . . .
>
> Q. What did he say?
>
> A. That they need to die; they are demons; they need to be tortured. It was sick stuff that I don't like coming out of my mouth. . . . I hate them; they are demons; they need to die; they need to be killed; I have got people working on that. You never know if he is kidding or serious. I want their throats cut; I want them tortured; I want them taken out

> and shot in the knee caps and told who is having it done and why it's being done.
>
> . . .
>
> Q. Did he say how he wanted Agent Hines killed or harmed?
>
> . . .
>
> A. No. The second visit . . . it wasn't specific. It was just malicious rhetoric, like I'm saying. He would be killed, executed. Dave becomes a madman when he talks about it. He will, literally, get very angry. It's anything you can think of that is wild. It grew and grew each time.

During this second visit, Hinkson asked Harding to get ammunition for guns that Hinkson kept in the house. Harding testified that Hinkson did not seem to know much about guns, and that he was very interested in what Harding knew about them: "[W]e talked about my knowledge of guns and that I grew up around guns and shotguns. He wanted to know how extensive my background was, the basics of how I got into it and why I was into it." Harding testified that he had worked as a bodyguard, and that Hinkson knew him through a friend who was also a bodyguard:

> Q. How do you know he knew you through another bodyguard?
>
> A. They were good friends. They were close friends.

Q. Who is that?

A. Mark Glover. . . . Him and David – I don't know how – are very close friends. And I know Mark through doing security work, bodyguarding.

. . .

Q. Have you worked as a bodyguard?

A. Yes.

Q. Have you worked with Mr. Glover?

A. Yes.

Harding became very friendly with Hinkson and frequently stayed at his house in Grangeville on the weekends. During those visits, Hinkson repeatedly discussed killing Cook, Hines, and Lodge.

Q. On the occasions that you go back up to Grangeville, would you see Mr. Hinkson?

A. Yes.

Q. Would you talk to him on the same subject matters of the three federal officers?

A. Extensively.

Q. Did he mention these things about killing federal officers more than once?

A. Every time we spoke, yes.

Q. How many times?

A. Fifty. . . .

Q. Did there come a time when he also offered you money?

A. Yes.

Q. In relationship to when you first came to Grangeville, that first trip in early January, when would be the second time he offered you money?

A. A couple of weeks, maybe.

The second time Hinkson offered Harding money, the two men were driving to the bank. Harding testified that Hinkson had $10,000 with him.

Q. What did he say . . . ?

A. Just leading. You could use the cash. Do you need cash? Do you need money. You could use this extra money. Think about it. I never knew if he was serious or kidding. He always talked about it and said it; and it was always leading, like I was supposed to bite.

Harding eventually became convinced that Hinkson had been serious in soliciting him to kill Cook, Hines, and Lodge. When Hinkson solicited him again in March of 2003, Harding contacted the F.B.I. He spoke to Nancy Cook, telling her, "Somebody is going to make an attempt on your life, I believe, if I don't make this phone call." The F.B.I. arranged for Harding to go back to Hinkson's house with a recording device concealed on his body. Possibly because Hinkson suspected the existence of the device, Hinkson said nothing incriminating on that occasion.

b. Evidence Supporting Counts 7 through 9

Counts 7 through 9 charged that between December 2002 and February 2003, Hinkson solicited Swisher to kill Cook, Hines, and Lodge. As noted above, the jury convicted Hinkson on these counts.

I have already described much of the evidence supporting Counts 7 through 9. I recount it here in more detail to facilitate a meaningful comparison to the evidence supporting Counts 1 through 3. Swisher took the stand wearing a Purple Heart pin on his lapel. On direct, he was folksy and garrulous:

Q. Mr. Swisher, how old of a man are you?

A. I turned 68 yesterday.

Q. You live in Idaho?

A. Yes, I do.

Q. For how long?

A. My gosh. Over thirty years.

. . .

Q. How did you have an interest in mining?

A. Well, I have an old friend, who is now dead – bless his soul – and he was one of the – he was the epitome of an Idaho range rider till the day he died. He carried an old, single-action Colt .45 and rode the range in the back country.

Q. My question is: How did you manage to switch careers [to mining]?

A. I'm getting to that, counselor.

Swisher testified that he had expertise in "assaying," and testified at some length about his work for WaterOz testing the concentration of minerals dissolved in the water. Then the prosecutor asked him about his military background, and Hinkson's interest in that background:

Q. Have you ever served in the Armed Forces, Mr. Swisher?

A. Yes.

Q. Did Mr. Hinkson ever ask you about your service in the Armed Forces?

A. Yes.

Q. What branch did you serve in?

A. United States Marine Corps.

Q. Did you ever discuss that with Mr. Hinkson?

A. Yes.

Q. And what was the nature of your discussion with him?

A. As I recall, Mr. Hinkson stated he had been in the Navy. I indicated I had been in the Marine Corps. He asked if I had served in any combat situations. I . . . told him, "Yes."

Q. What else did he ask you about combat situations?

A. He asked if I had ever killed anyone.

Q. What did you say?

A. I told him, "Yes." He asked, "How many?" And I told him, "Too many."

Q. Was that one conversation or several?

A. It may have happened over a period of time.

Q. What period of time?

A. Oh, probably off and on throughout the year 2001.

Swisher testified that Hinkson knew that he was an expert with firearms:

Q. Did you ever claim to Mr. Hinkson that you had proficiency with firearms?

A. I believe he knew that I was an expert rifleman, pistolman.

Q. How did he know that?

. . .

A. I probably told him, and he observed my shooting.

Q. What was the occasion that you went shooting with him?

A. I believe it was probably in December, sometime in December of 2002, that he had a

gentleman from . . . Ukraine, visiting. . . . He said we were going to meet out at an employee's who lived in the country, Mr. Rich Bellon. . . . [W]e shot during the course of the day.

Q. Who did?

A. Myself, Mr. Hinkson, and the Russian gentleman.

. . .

Q. What did you bring?

A. I brought a .22 Henry lever-action rifle and .32 semi-automatic Browning pistol, and a .45 auto.

Q. How was your shooting?

A. I always hit what I aim at.

Q. How was Mr. Hinkson's shooting?

A. Not terribly good.

Q. What were you shooting at?

A. Well, we shot some trap with a shotgun. I only shot maybe a half dozen times because I recently had a pacemaker installed; and a shotgun, a twelve-gauge particularly, kind of jars you around a little. I decided I would quit in due time, but I hit my targets. As I recall, I don't believe David hit any of his.

Swisher described their "trap shooting" as follows:

> The person who wasn't shooting would throw the clay pigeons for the others. You have a spring-loaded hand unit that will kick them out, I expect, thirty, forty yards without any problem at all, airborne. . . . And the challenge is to hit the airborne target when it's across from you.

Swisher testified that Hinkson was very angry at Dennis Albers, whom Swisher also disliked. Swisher testified that sometime shortly after April 2002 Hinkson told him "in private" that he wanted Albers and his family members tortured and killed:

> Q. What was it that Mr. Hinkson said?
>
> A. Well, he started off by talking about how he would like to have Mr. Albers and his family, particularly his wife, Margaret, tortured and killed. And he went into quite a description of the torture.
>
> Q. And what was that?
>
> A. He would – he said he would like to see them stripped, bound, and gagged, and then burned with cigarettes or cigars. And then while Albers was down on his knees observing this occurring to his wife and any other family members that might be present, he wanted to have a plastic bag put over her head so that she would suffocate to death in front of him, along with the other family members. Then he wanted that procedure repeated on Mr. Albers, himself.

Q. Did he want you to do something in that regard?

A. When he finished describing what he wanted done, then he offered me $10,000 a head to do it.

Q. What was his demeanor like when he was telling you these things?

A. He was cool and calm at that time.

Q. What was your response to Mr. Hinkson?

A. I told him he was out of his mind and he needed to knock that kind of BS off, and I didn't even think about it.

Q. How did he respond to that?

A. He just smiled and then didn't reply and changed the subject.

Swisher testified that he had a further conversation "in Hinkson's trailer" in July or August of 2002:

Q. What did Mr. Hinkson say about how he felt about Nancy Cook and Steve Hines?

A. He wanted them treated in the same fashion as he had initially described for Mr. Albers and his family. . . . [H]e asked if I remembered the offer he made regarding Mr. Albers and his family. And I said that, of course, I did. And he said he wanted that done, basically, with Ms. Cook and her family and Mr. Hines and his family. And I told him, again, that he was out of his mind. And I,

> also, went into a little bit of a dissertation because David was a friend at that time. And he said, "Well, you know, I know you're used to it. I mean, you have killed people." I said, "Yes, I have killed people in defense of my life and others; but what you are talking about is murder, and there is a significant difference here. And you need to get it out of your head because, if you continue talking that way, it will get you in trouble. And if you continue talking this way and I think you are serious about this, I will have to report it to the authorities."
>
> Q. How did he respond to that?
>
> A. Well, he got his smile again; and then he changed the subject.

Swisher testified that after Cook and Hines arrested Hinkson in a raid on his house in November 2002, his hostility toward them intensified. Swisher testified, further, that Hinkson had a third conversation in which Judge Lodge was added to the list of intended victims:

> A. [I]n January of '03, he approached me again[,] went through the names of the people that had offended him, and added a federal judge by the name of Lodge to that list. And I, essentially, dropped the hammer at that point on David.
>
> Q. Let me first ask what he asked you to do regarding those people?

A. He wanted them all treated the way that the initial offer regarding Albers and his family had been handled.

Q. Were you to receive anything in return for doing that?

A. At least $10,000 a head. And I made a mental note that, with all of the people he named at that time, we were well over $100,000.

. . .

Q. Did the $10,000 offer include Nancy Cook and Steve Hines?

A. Oh, yes.

Q. Did it include Mr. Albers?

A. Yes.

Q. Did it include the children of those people?

A. Yes.

Q. What did he want done with the children of those people?

A. Treated in the same fashion.

Q. How?

A. Tortured and killed.

Q. Now, you mentioned, this time, you reacted in a different fashion?

A. Yes, I did. I'm afraid I became a bit hostile, myself, at that point in time.

Q. What did you say?

. . .

A. I told him, regarding these matters of trying to kill people or having me murder them for him and so on, that I never wanted to hear that again and to fuck off. And he left.

Q. What was his demeanor like when he was asking you to do this?

A. He was almost in a pleading fashion that last time. He was telling me how harassed he had been and how they had hurt him and they were out to not just get him but to kill him, too, and he just had to have this done; and as his best friend, as he put it at that time, he felt I should do it.

Swisher testified that sometime in the spring or summer of 2003, he finally contacted a law enforcement official. However, he was unsure about the date on which he did so, and he was unforthcoming about the details of what he told law enforcement officials:

Q. When did you contact anyone in legal authority regarding Mr. Hinkson?

A. Oh, I think it was probably just before he was rearrested in '03. I'm not quite sure of the date there.

Q. Are you talking about spring or summer '03 or what?

A. No. It would have probably been getting close to summer there. Spring, summer, somewhere through there. Sometime after April, I'm thinking.

Q. All right.

A. I might be wrong.

Q. And who did you contact?

A. I contacted the Idaho County Assistant Prosecutor from Grangeville.

Q. Now, is he a State Prosecutor, as opposed to a Federal Prosecutor?

A. Yes. That's correct.

Q. And did you express some concern to him?

A. I did.

Q. Was it regarding Mr. Hinkson?

A. Yes.

Q. Thereafter, were you contacted by the FBI?

A. Yes.

Q. Who contacted you?

A. Mr. Will Long.

Q. That's the person here at the table?

A. Correct, sitting right there.

> THE COURT: For the record, the witness has identified Special Agent Long.
>
> [THE PROSECUTOR]: Thank you, Your Honor. I have no further questions on direct, Your Honor.

The government's direct examination of Swisher filled forty-three pages of transcript. Cross examination, not including Swisher's testimony about the Purple Heart and the "replacement DD-214," filled eighty-three pages. During this cross examination, Swisher made clear that on each of the three occasions when Hinkson solicited him to kill Albers, Cook, Hines, and Lodge, there were no witnesses. Swisher stated plainly: "When he made the three direct solicitations to me, they were made in private."

Much of the cross examination was devoted to showing the extreme hostility between Swisher and Hinkson. This hostility had arisen after Hinkson's supposed solicitations of Swisher to commit murder, for reasons unrelated to the solicitations. Richard Bellon was one of Hinkson's key employees at WaterOz; indeed, the trap shooting had taken place at Bellon's house. Sometime in late 2003, Bellon sued Hinkson. In response, Hinkson brought Swisher into the suit, apparently as a third-party defendant. Swisher then counterclaimed against Hinkson for more than $500,000.

Relations between Swisher and Hinkson became so strained that Swisher accused Hinkson of hiring someone to kill him. Swisher testified that he was "at

a remote area in Idaho County with a Vietnam combat veteran friend." Swisher said that he was sitting in an outhouse when, according to his testimony, someone hired by Hinkson shot at him and missed. However, Swisher admitted that he never saw the person who supposedly did the shooting, and that no shell casings or footprints were ever found.

Only one witness corroborated Swisher's testimony that Hinkson had been interested in, and impressed by, Swisher's military background. That witness was Richard Bellon. Bellon testified that Hinkson "wanted to hire Joe Swisher as a bodyguard." "[H]e felt like he needed to hire [Swisher] because he was trained":

> Q. Did [Hinkson] explain to you how Mr. Swisher was trained?
>
> A. Yes. . . . [I]t was that Mr. Swisher had an extensive military background, that he had been in combat, and that he had killed people during the war. Mr. Hinkson would tell me about that and the details of him, his past.

In his own testimony, Swisher never mentioned that Hinkson had wanted to hire him as a bodyguard. Nor did Swisher ever mention that Hinkson had been interested in his military background because of a desire to hire a bodyguard. Hinkson took the stand in his own defense. Swisher had already testified that on three occasions Hinkson had solicited him "in

private" to commit murder. Hinkson specifically denied having made such solicitations:

> Q. Mr. Hinkson, Mr. Swisher indicated that he had been solicited by you on a number of occasions. . . . Do you recall that he said that in his testimony?
>
> A. . . . Yeah.
>
> Q. Mr. Hinkson, did you ever have a communication with Mr. Swisher where you asked him to murder anyone?
>
> A. No, sir.

Hinkson had a somewhat different recollection of the excursion to Bellon's house. According to Swisher, they had engaged in trap shooting "during the course of the day." Swisher testified, "I hit my targets." Hinkson testified:

> Q. Do you remember the evening that Mr. Swisher went to Mr. Bellon's house with you for dinner?
>
> A. Yes, I do.
>
> Q. And I believe there was testimony that that occurred in approximately September of '02?
>
> A. Yes, just before his open heart surgery.
>
> . . .
>
> Q. And there was someone who came to dinner that night? Who was that?

A. Roman Polankio from the Ukraine.

. . .

Q. Who fired the gun that evening?

A. I'm not really interested in guns, and I shot it twice. Mostly, Joe [Swisher] shot from his chair because he had a hard time standing. He was pretty sick.

Bellon, at whose home the trap shooting took place, was called by the government to testify. The government did not ask Bellon whether it was true that Swisher was then "pretty sick" with heart disease; that Swisher shot "mostly . . . from his chair"; or that Swisher, though ill and sitting in a chair, successfully hit all of his targets. Those targets, according to Swisher's testimony, had been rapidly moving airborne clay pigeons thirty to forty yards away.

c. Comparison of the Evidence in Counts 1 through 3 and Counts 7 through 9

The background evidence against Hinkson was the same for both Counts 1 through 3 (the Harding-related counts on which he was acquitted) and Counts 7 through 9 (the Swisher-related counts on which he was convicted). It was relevant to all of these counts that Hinkson had a paranoid unstable personality; that he disliked government interference with his affairs; that he particularly disliked Cook, Hines, and Lodge; and that he had asked multiple people on multiple occasions, not limited to Harding

and Swisher, to kill Cook, Hines, and Lodge on his behalf.

The evidence specific to Counts 1 through 3 and Counts 7 through 9 is similar in a number of respects. First, there was evidence that Hinkson believed that both Harding and Swisher were skilled in the use of firearms. Second, there was evidence that Hinkson knew that Harding had been a bodyguard, and that he was interested in using Swisher as a bodyguard. Indeed, Bellon testified that Hinkson's interest in Swisher's military background and skill in firearms stemmed from his interest in using Swisher as a bodyguard. Third, the charged solicitations took place at about the same time. Counts 1 through 3 charged conduct that supposedly took place in January 2003. Counts 7 through 9 charged conduct that supposedly took place between December 2002 and February 2003.

The evidence specific to these counts differed in some respects. However, three of those differences made it more likely that the jury would have convicted on the Harding-related counts rather than on the Swisher-related counts.

First, there was a corroborating witness to one of the charged solicitations of Harding. Bates was a witness to the solicitation in Hinkson's kitchen at the beginning of January. She testified that she saw the "wad" of money on the kitchen table and that she heard Hinkson tell Harding that the money was his if he killed Cook, Hines, and Lodge. Bates testified that

Hinkson had not said that he was joking when he said this. By contrast, Swisher testified that there were no witnesses to any of Hinkson's three solicitations. He specifically testified that all three solicitations took place "in private."

Second, Harding and Hinkson were good friends at the time of the solicitations. They became unfriendly only as a result of Harding's reporting to the F.B.I. that Hinkson had solicited him to commit murder. Swisher and Hinkson also had been good friends at the time of the solicitations. But, by contrast to Harding, Swisher had become a bitter enemy, for reasons unrelated to the solicitations, by the time of trial. Thus, unlike Harding, Swisher had ample reason, unrelated to the solicitations, to wish Hinkson ill when he testified at trial.

Third, Harding testified that Hinkson first solicited him in January 2003 to murder Cook, Hines, and Lodge. He testified that Hinkson solicited him again in March 2003. Immediately after the March solicitation, Harding contacted the F.B.I. In an effort to help the F.B.I., Harding went so far as to wear a secret recording device in an attempt to obtain incriminating evidence against Hinkson. By contrast, Swisher testified that Hinkson solicited him shortly after April 2002 to murder Albers. Swisher testified further that Hinkson solicited him in July or August 2002 to murder Cook and Hines. Finally, Swisher testified that Hinkson solicited him in November 2002 to murder Cook, Hines, and Lodge. Swisher testified that he did not go to a local Idaho prosecutor

to report Hinkson's solicitations until sometime after April 2003.

Harding was so concerned about Hinkson that he went to the F.B.I. within two months of the time Hinkson first solicited him, and immediately after the second time. When Harding contacted the F.B.I., he and Hinkson were still on good terms. Harding testified that he spoke directly to Nancy Cook, one of Hinkson's would-be victims, and told her that he thought she was in danger. Harding then wore a wire at the request of the F.B.I. in an attempt to obtain evidence against someone he clearly thought was dangerous. By contrast, Swisher waited at least a year after Hinkson solicited him to murder Albers, at least nine or ten months after Hinkson solicited him to murder Cook and Hines, and at least three or four months after Hinkson solicited him to murder Cook, Hines, and Lodge before reporting Hinkson to law enforcement officials. Unlike Harding, Swisher called a local Idaho prosecutor rather than the F.B.I., even though federal officers had been threatened, and, unlike Harding, Swisher gave no specifics about what he told law enforcement officials. When Swisher finally contacted the local prosecutor, he and Hinkson were no longer on good terms. There is nothing in the record to indicate that Swisher ever offered to wear a wire or otherwise to help gather incriminating evidence against Hinkson.

In three respects the evidence against Hinkson at trial was stronger in the Swisher-related counts than in the Harding-related counts.

First, Swisher testified that Hinkson believed him to be particularly well qualified to be a killer. Swisher testified that he told Hinkson about his combat experience in Korea, and that he had killed "too many" people. We now know that Swisher was never in combat in Korea and that he never killed anyone, let alone "too many" people. However, there is evidence from both Swisher and Bellon that Hinkson believed the story. Swisher's (falsely claimed) combat experience could well have made a greater impression on Hinkson than Harding's experience with firearms and his work as a bodyguard. There was a great deal of evidence at trial – most of it from Swisher himself – about Swisher's ill-health. But the jury could have concluded that despite Swisher's ill-health, Hinkson could have seen him as a well qualified killer.

Swisher further testified that while trap shooting he had demonstrated to Hinkson that he was an excellent shot. The jury might have had some reason to doubt Swisher's testimony that he hit all of his targets, given that Hinkson described Swisher as a very sick man who sat in a chair while shooting. But the jury could well have disbelieved Hinkson, and could have believed that Swisher had indeed demonstrated to Hinkson on that occasion that he was an excellent shot. The jury could have concluded that an actual demonstration of shooting prowess by Swisher was more impressive to Hinkson than Harding's mere talk about his knowledge of guns.

Second, Swisher testified that during the first solicitation Hinkson's "demeanor" had been "calm and cool," and that during the third solicitation Hinkson's "demeanor" was "almost in a pleading fashion." By contrast, Harding testified that he had difficulty telling whether Hinkson was serious in soliciting the murders. Only after a second solicitation in March did Harding decide that Hinkson had been serious.

Third, Swisher presented himself as a United States Marine who had been wounded in the service of his country. His status as a decorated war hero may have been, for some or all of the jurors, an additional reason to believe his testimony. The jury may have found Swisher particularly credible and sympathetic when, after an accusation by Hinkson's counsel that Swisher was lying about his military record, Swisher dramatically produced his "replacement DD-214" from his pocket. The jury might also, despite the district court's instruction, have penalized the defense for what appeared to be an unfounded attack on a decorated war hero.

Our task is not to replay the first trial except as it might help us predict what would happen if Hinkson is retried on Counts 7 through 9. The question before us is what would happen at a new trial. Specifically, the question is whether the fifth *Harrington* requirement is satisfied: Does the new evidence "indicate that a new trial would probably result in acquittal"?

In the original trial, Swisher was the only witness to provide direct evidence that Hinkson solicited him to commit the killings. On retrial, the government would have no choice but to rely on Swisher to supply the evidence of Hinkson's solicitations. To say that Swisher's credibility would fare poorly at a new trial is an understatement.

At Hinkson's original trial, the jurors almost certainly had the impression that Swisher was a decorated combat veteran. The prosecutor described Swisher in his opening statement as a "Combat Veteran from Korea during the Korean Conflict" who "was not averse to . . . violent, dangerous activity," and stated in his closing argument that Hinkson "understood" that Swisher "had served in combat and killed people." In response to defense counsel's questions, Swisher produced his "replacement DD-214" on the witness stand and testified that he had seen combat in Korea and earned a Purple Heart. Defense counsel asked the district court to instruct the jury to disregard that testimony because he feared that the jury might penalize the defense for wrongly assailing a war hero. Although the court granted defense counsel's request, the court's instruction to the jury referred to Swisher's lapel pin as a "Purple Heart Medal" and a "military commendation."

Defense counsel's efforts to impeach Swisher at the original trial focused on the fact that Swisher and Hinkson, who were once friends, were now bitter enemies who had sued and counter-sued each other. On retrial, impeachment of Swisher would not be so

limited. The parties now know conclusively, based on the Miller and Woodring affidavits, that Swisher forged his "replacement DD-214" and his purported "supporting letter" from Colonel Woodring, and that he used these forged documents in an effort to obtain veterans' benefits. The parties also now know conclusively that Swisher never served in combat or earned any personal military commendations, and that he was not injured in battle overseas but in a private automobile accident near Port Townsend, Washington. And they now know conclusively that Swisher lied under oath during the first trial about participating in secret combat missions in North Korea, about being wounded in action, and about receiving a Purple Heart.

At a new trial, the government could put Swisher on the stand to testify, as he did at the original trial, that he told Hinkson that he was a decorated Korean War veteran who had killed "too many" people. The government could then argue that Hinkson, believing these things, seriously solicited Swisher to kill three government officials. But this time, on retrial, defense counsel and the government would know the truth.

Defense counsel would impeach Swisher by asking if it was true that he was not in fact a Korean War veteran; that he had in fact not won a Purple Heart or other awards; that he had not in fact been injured in combat in Korea but rather in a private automobile accident; and that in fact he had lied to the Idaho Division of Veterans Services about his

injuries and non-existent medals in an attempt to get military benefits to which he was not entitled. That would already be bad enough, but it would get worse.

Defense counsel would also ask Swisher whether, the last time he appeared in court to testify under oath against Hinkson, he wore a Purple Heart lapel pin to which he was not entitled, presented a forged "replacement DD-214," and lied about his military record. This time, defense counsel would not be left defenseless if Swisher were to choose to lie in response to these questions because this time the government would also know the truth. If Swisher were to lie in response to any of the questions, the government would be obligated to correct the record. *See Napue,* 360 U.S. at 269; *Hayes v. Brown,* 399 F.3d 972, 978 (9th Cir. 2005) (en banc).

In short, a new trial would be a disaster for the government. A new jury would not only learn, as the first jury did, that Swisher and Hinkson, once friends, had become bitter enemies by the time Swisher testified. It would also learn, as the first jury did not, that Swisher had no compunction about lying under oath to serve his ends, and that he had lied under oath and produced forged documents at Hinkson's first trial. I therefore conclude, under the fifth part of the *Harrington* test, that a new trial would probably result in acquittal.

6. Summary

Because Hinkson's motion met all five requirements of the *Harrington* test, I would hold that he is entitled to a new trial on the Swisher-related counts of soliciting murder.

Conclusion

The district court committed two errors, either of which was sufficient to reverse its decision and grant Hinkson a new trial. I would reverse the district court's denial of Hinkson's motion for a new trial because the district court erroneously precluded Hinkson from introducing documents into evidence to show that Swisher lied about his military record and forged his "replacement DD-214." I would also reverse the district court's denial of the motion for a new trial because the newly discovered evidence produced in support of the motion satisfies the five-part *Harrington* test.

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DAVID ROLAND HINKSON, *Defendant-Appellant.*	No. 05-30303 D.C. No. CR-04-00127-RCT OPINION

Appeal from the United States District Court
for the District of Idaho
Richard C. Tallman, Circuit Judge, Presiding

Argued and Submitted
December 16, 2008 – Pasadena, California

Filed November 5, 2009

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Kim McLane Wardlaw, William A. Fletcher, Richard A. Paez, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta and N. Randy Smith, Circuit Judges.

Opinion by Judge Bea;
Dissent by Judge W. Fletcher

COUNSEL

Dennis P. Riordan and Donald M. Horgan, San Francisco, California, and Curtis R. Smith, Idaho Falls, Idaho, for the defendant-appellant.

John F. De Pue and Michael D. Taxay, Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

BEA, Circuit Judge:

Today we consider the familiar "abuse of discretion" standard and how it limits our power as an appellate court to substitute our view of the facts, and the application of those facts to law, for that of the district court.

* * *

Introduction

David Hinkson refused to pay income tax on his business profits. He asserted the United States Constitution forbade the federal government from taxing a person's income. He was investigated by Internal Revenue Service Agent Steven Hines, prosecuted to a conviction for income tax evasion by United States Attorney Nancy Cook, and sentenced by United States District Judge Edward Lodge.

While awaiting trial on his tax evasion case, Hinkson solicited his friend and employee Elven Joe

Swisher to torture and kill Hines, Cook, and Lodge, for $10,000 per head. Swisher reported Hinkson's solicitations to federal authorities.

Hinkson was indicted, tried, and convicted by a jury for solicitation of the murder of the three federal officials. Swisher testified on behalf of the government.

Hinkson then moved for a new trial principally on grounds that Swisher had fraudulently presented himself to Hinkson, and later to the judge and jury, as a Korean War veteran with experience in killing people, but he had no such war service nor experience. In brief, Swisher had falsely held himself out to be a war hero. The trial court denied the new trial motion.

Hinkson appealed this denial of his new trial motion and several evidentiary rulings made by the trial court.

We granted en banc review of the panel's decision to reverse the district court's denial of Hinkson's new trial motion and, for the reasons explained below, we conclude that our "abuse of discretion" standard is in need of clarification. The standard, as it is currently described, grants a court of appeals power to reverse a district court's determination of facts tried before it, and the application of those facts to law, if the court of appeals forms a "definite and firm conviction that a mistake has been committed." At the same time, the standard denies a court of appeals the power to

reverse such a determination if the district court's finding is "permissible."

Because it has previously been left to us to decide, without further objective guidance, whether we have a "definite and firm conviction that mistake has been committed," or whether a district court's finding is "permissible," there has been no effective limit on our power to substitute our judgment for that of the district court.

Today, after review of our cases and relevant Supreme Court precedent, we re-state the "abuse of discretion" standard of review of a trial court's factual findings as an objective two-part test. As discussed below, our newly stated "abuse of discretion" test requires us first to consider whether the district court identified the correct legal standard for decision of the issue before it. Second, the test then requires us to determine whether the district court's findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.

Applying our "abuse of discretion" test, we affirm the district court's rulings.

Background

Hinkson owned and operated a Grangeville, Idaho water-bottling company called WaterOz, which sold bottled water with purported health benefits.

Elven Joe Swisher was a water safety tester for a nearby independent water testing company. In 2000, Hinkson hired Swisher to test the WaterOz water on an ongoing basis. Hinkson and Swisher became fast friends. Swisher told Hinkson he was a veteran of the United States Marine Corps and a firearms expert who had killed a number of people in the Korean War. Swisher would later testify this seemed greatly to impress Hinkson.

In April 2002, according to Swisher, Hinkson asked him to torture and kill local attorney Dennis Albers and his family because Albers had been causing legal trouble for Hinkson. Hinskon offered Swisher $10,000 per "head" in payment. Swisher thought Hinkson was joking and brushed off the suggestion.

Meanwhile, Hinkson was refusing to pay federal income tax on his WaterOz profits, asserting that the Constitution prohibits the federal government from collecting income tax. Assistant United States Attorney Nancy Cook and Internal Revenue Service Special Agent Steven Hines led an investigation into Hinkson's possible tax evasion.

Swisher would later testify that in July or August 2002, Hinkson asked him if he remembered his request regarding Albers and his family. Swisher said he did, and Hinkson told Swisher he wanted Cook and Hines and their families "treated in the same way as Albers." "I know you're used to it," Hinkson prodded Swisher, "I mean, you have killed people."

Swisher, less convinced this time that Hinkson was joking, refused and threatened to report Hinkson to authorities.

In November 2002, Cook and Hines executed search warrants on Hinkson's home; Hines arrested Hinkson on tax evasion charges.[1] The magistrate judge freed Hinkson on bail pending trial. Judge Edward J. Lodge of the United States District Court for the District of Idaho was assigned the case.

While Hinkson was on pretrial release on the tax evasion charges, Swisher later testified, Hinkson once again asked Swisher to torture and kill Cook and Hines and their families; this time he also added Judge Lodge to the list. Hinkson again offered Swisher $10,000 per "head," and even "pleaded" with Swisher to do the deed, calling Swisher his "best friend." Swisher declined.

The relationship between Swisher and Hinkson soon soured. A WaterOz employee named Richard Bellon sued Hinkson for control of WaterOz, and Hinkson in turn sued Swisher. Swisher counter-claimed against Hinkson for more than $500,000.

In January 2003, Hinkson met bodyguard-turned-restaurant manager James Harding at a "health forum" in Southern California. Hinkson offered Harding

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[1] The government eventually indicted and convicted Hinkson on tax evasion and related charges. *United States v. Hinkson*, 281 Fed. Appx. 651, 653 (9th Cir. 2008).

a job at WaterOz and invited him to stay in Hinkson's home. Harding later testified that, during his stay, Hinkson handed him a "large amount" of cash and offered him $20,000 total if he would kill Cook, Hines, and Lodge. Harding refused. In March 2003, Hinkson again asked Harding to kill Cook, Hines, and Lodge. Harding again refused. After this second request, Harding called the FBI and reported Hinkson's solicitations.

Shortly thereafter, in Spring or Summer 2003, Swisher told an Idaho state prosecutor that Hinkson had solicited him to kill Cook, Hines, and Lodge. Swisher then contacted the FBI and told the FBI the same.

On September 21, 2004, a federal grand jury in Idaho indicted Hinkson for soliciting the murders of Cook, Hines, and Lodge. The indictment contained 11 counts:

Counts 1 through 3 charged Hinkson with violating 18 U.S.C. § 373[2] when he solicited Harding to

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[2] 18 U.S.C. § 373(a): "Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force . . . against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or . . . fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life

(Continued on following page)

torture and kill Cook, Hines, and Lodge in January 2003.[3]

Counts 4 through 6 charged Hinkson with violating 18 U.S.C. § 373 when he solicited Harding to torture and kill Cook, Hines, and Lodge a second time, in March 2003.[4]

Counts 7 through 9 charged Hinkson with violating 18 U.S.C. § 373 by soliciting Swisher to torture and kill Cook, Hines, and Lodge.[5]

Counts 10 and 11 charged Hinkson with violating 18 U.S.C. § 115[6] by threatening to kill the children of Cook and Hines.[7]

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imprisonment or death, shall be imprisoned for not more than twenty years."

[3] The jury would eventually acquit Hinkson on these counts.

[4] The jury would eventually deadlock on these counts.

[5] The jury would eventually convict Hinkson on these counts.

[6] 18 U.S.C. § 115(a)(1)(A) (Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member): "Whoever . . . threatens to assault, kidnap or murder a member of the immediate family of a United States official, a United States judge, [or] a Federal law enforcement officer . . . [shall be imprisoned for a maximum of] six years."

[7] The jury would eventually acquit Hinkson on these counts.

Trial

Hinkson's two-week jury trial began January 11, 2005. The government's opening statement revealed its theory of the case as to counts 7-11: that Hinkson solicited Swisher in particular to murder Cook, Hines, and Lodge because Hinkson believed Swisher was a battle-hardened Marine veteran with numerous military kills to his name. The prosecution also stated that Swisher was, in fact, such a battle-hardened veteran.[8]

The government called Swisher to testify three days later. On direct examination, although the prosecutor asked whether Swisher had served in the "Armed Forces" – and Swisher testified accurately that he had served in the U.S. Marine Corps – the prosecutor did not ask whether Swisher had engaged in combat or earned any decorations. Instead, the prosecutor confined his questions to what Swisher had *told* Hinkson of his combat experience. Swisher explained he had told Hinkson he was a Korean War veteran with substantial combat experience. Swisher also testified that Hinkson had solicited him to torture and kill Cook, Hines, and Lodge.

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[8] Hinkson neither objected to, nor moved to strike, this statement. The trial judge instructed the jury statements of counsel were not evidence of their content. The prosecutor did not repeat this claim in opening or closing argument. Hinkson does not assign this statement error on appeal.

On cross-examination, Hinkson's attorney first sought to impeach Swisher's credibility by establishing that Swisher harbored animosity toward Hinkson. He asked about litigation involving the two former friends, and the bitter feud that had developed between them. Hinkson's attorney also attacked inconsistencies in Swisher's testimony.

After he had finished his cross-examination of Swisher for such animosity toward Hinkson, Hinkson's attorney asked for a sidebar conference with the judge and opposing counsel, outside the hearing of the jury. There he pointed out that Swisher appeared to be wearing a Purple Heart on his lapel, and informed the court he had been trying to "dig into" Swisher's military history for "some time" because he did not believe Swisher had served in the Korean War nor earned a Purple Heart.[9] Hinkson's attorney pointed out that Swisher, born in 1937, would have been between the ages of 13-16 during the Korean War of 1950-53.

Hinkson's attorney then showed the court and counsel a letter he had received that morning from a Bruce Tolbert, an archives technician with the National Personnel Records Center, which maintained

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[9] Indeed, Hinkson's counsel had learned of Swisher's claims of martial glory at Swisher's deposition three months earlier in the WaterOz case, and again with the recent delivery of the transcript of Swisher's testimony before the Grand Jury that had indicted Hinkson for the charges on trial. For more details, *see infra* at 14967-68.

official military records for the Armed Forces ("Tolbert letter"). The Tolbert letter stated that Swisher's official military record did not list him as entitled to *any* personal military decorations, including a Purple Heart.

The prosecutor then noted that there was no testimony explaining what Swisher had on his lapel, and that the prosecutor did not know what it was. The prosecutor also pointed out that he had not questioned Swisher about his military record during direct examination. Rather, Swisher was questioned only about what he *told* Hinkson about his military record, because the government's theory of the case was that Hinkson's belief in Swisher's military experience was the reason he had solicited Swisher in particular to commit the murders.

Hinkson's attorney moved to re-open cross examination to inquire about Swisher's purported military service and the object on his lapel. The prosecutor suggested Hinkson's attorney should not "go there." But Hinkson's attorney wanted to "go there," and the court granted the motion to re-open cross-examination. In response to Hinkson's attorney's questions, Swisher testified he was wearing "a Purple Heart medal" awarded to him by the United States government, and that he served in combat "following" the Korean War on classified missions to free prisoners of war held in secret North Korean prison camps.

Hinkson's attorney then placed the Tolbert letter (which stated Swisher had been awarded no medals)

before Swisher and asked him whether he still maintained that he was a combat veteran who had earned a Purple Heart medal. Swisher reiterated that he did, and, in a moment of Perry Mason court-room drama, whipped from his jacket pocket a form titled "Replacement DD-214."[10] Swisher's "Replacement DD-214" form was stamped "certified," signed by a Capt. W. J. Woodring, and dated October 1957. The form read that Swisher had been awarded, and was entitled to wear, the Purple Heart medal, the Silver Star, the Navy and Marine Corps medal with Gold Star, and the Navy and Marine Corps Commendation Medal with Combat "V." The form also stated Swisher was injured by shrapnel in combat.[11]

The court asked for a copy to be made of the "Replacement DD-214" form for each party to review; the prosecutor replied that he already had a copy – perhaps explaining why he had suggested to defense counsel he not "go there."[12] Hinkson's attorney then moved for a mistrial on the ground the prosecutor

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[10] A DD-214 form is the military's official discharge form, which lists final rank and injuries or decorations, if any.

[11] The only decoration before the jury was the Purple Heart, as to which the trial judge ordered all such testimony stricken and to be disregarded. The other decorations mentioned in the DD-214 were never mentioned to the jury. The DD-214 was not admitted into evidence; its content was not read to the jury.

[12] Hinkson makes no claim on appeal the "Replacement DD-214" produced by Swisher at trial, a copy of which was in the prosecutor's file, constituted exonerating evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

admitted he knew of Swisher's "Replacement DD-214" form previously and should have spoken up about it. The prosecutor replied that Hinkson's attorney, not the government, had brought up the issue whether Swisher was a decorated combat veteran, and the prosecutor had even warned Hinkson's attorney not "to go there," so the government bore no responsibility for Swisher's testimony on the subject. The court agreed with the government that Hinkson's attorney had tried for a "grandstand play" that had backfired. However, the court decided to instruct the jury that, after "a long day . . . I made a mistake in allowing the questioning with regard to the Purple Heart medal," and the jury should "disregard completely all of Mr. Swisher's testimony with regard to that military commendation."

Five days later, on January 19, 2005, Hinkson's attorney told the court the National Personnel Records Center would provide a certified copy of Swisher's full military record, but only pursuant to a court-issued subpoena. The court issued a subpoena for Swisher's full military record that same day.

Two days later, on January 21, 2005, outside the presence of the jury, the government brought to the court's and Hinkson's attorney's attention a letter from Lt. Col. K. G. Dowling of the National Personnel Management Support Branch of the United States Marine Corps, to Ron Keeley of the Idaho Veterans Affairs Services ("Dowling" letter). The government

could not specify precisely when it received the letter, except that it received the letter the preceding week.[13]

The Dowling letter was a response to Keeley's inquiry to the Marine Corps records department after Swisher attempted to use the "Replacement DD-214" form he produced on the stand to obtain benefits from the Idaho branch of the Department of Veterans Affairs. Keeley had inquired of Dowling whether Swisher's "Replacement DD-214" was legitimate. Dowling's response letter stated Swisher's purported "Replacement DD-214" form did not exist in Swisher's official file. Instead, according to the Dowling letter, the "Replacement DD-214" form in Swisher's official file clearly read that Swisher had not been awarded *any* medals and that, in fact, he was injured in an automobile accident in Washington State, not in combat. Further, the Dowling letter noted several of the medals listed on Swisher's purported "Replacement DD-214" form did not even exist in 1957, when the form was dated.

That same day, January 21, 2005, Swisher's official military file arrived at the court. The file contained a "Replacement DD-214" form identical to the form described in the Dowling letter – that is, a form listing no medals and no combat wounds. Swisher's

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[13] As part of this appeal, the government sought and received judicial notice of documents that were not before the district court and that show the prosecutor received the Dowling letter on January 19, 2005. Hinkson makes no *Brady* claim on appeal as to the Dowling letter.

official military file also contained the Dowling letter itself, and two photocopies of documents Keeley had sent to Dowling for authentication: (1) the Swisher-produced "Replacement DD-214" form, and (2) a letter Swisher provided Keeley along with it. This letter, which bore the signature of the same Woodring (now a Colonel) whose signature appeared on Swisher's purported "Replacement DD-214" form, was dated October 16, 1957 ("Woodring letter"). The Woodring letter stated the Purple Heart and other medals listed on Swisher's purported "Replacement DD-214" form had been "certified" by military command and that Swisher was entitled to wear them.

After reading Swisher's full military record *in camera,* the court informed counsel that Swisher's military file appeared to state Swisher was involved in "top secret activities" and was "awarded the medals he says he was awarded." The court concluded, however, the file was "very difficult to decipher" and the documents were "neither self-authenticating nor self-explanatory." The court stated it was "not convinced" one way or the other whether the Swisher-produced "Replacement DD-214" form was credible because Swisher's military record was "not explanatory."

The court said evidence that might establish whether Swisher was a fraud could include testimony from a custodian of military records who could interpret Swisher's military file, or from Col. Woodring, whose signature appeared on the Swisher-produced "Replacement DD-214" form. Hinkson's attorney did

not move for a continuance of the trial to allow him time to procure such a custodian to decipher the military record, or to procure testimony from Col. Woodring.

Hinkson's attorney nevertheless offered both the Dowling letter and Swisher's military file into evidence. The court found both inadmissible for two reasons: (1) the Dowling letter and Swisher's military file were unauthenticated and facially inconclusive as to whether Swisher had lied about his military record, and without any foundation, the court excluded the evidence under Federal Rule of Evidence 403 as distracting, confusing, and a waste of significant time; and (2) the documents had no relevance other than as extrinsic evidence probative of a specific incident of Swisher's untruthfulness, and thus were objectionable under Federal Rule of Evidence 608(b).[14]

The court gave Hinkson's attorney an option to re-open cross-examination of Swisher to *inquire* about Swisher's military record and the veracity of his prior testimony about his medals. The court also cautioned

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[14] Fed. R. Evid. 608(b): "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

Hinkson's attorney he could not introduce the Dowling letter or military record into *evidence*, because introduction of such extrinsic evidence was prohibited by Fed. R. Evid. 608(b). Hinkson's attorney chose not to re-open cross-examination.

Four days later, on January 25, 2005, the government gave a closing argument that contended Hinkson's belief that Swisher was a tough combat veteran with multiple kills to his name was the reason Hinkson solicited Swisher to kill Cook, Hines, and Lodge.

The jury deliberated for two days before convicting Hinkson of soliciting Swisher to kill Cook, Hines, and Lodge. The jury deadlocked on whether Hinkson solicited Harding to kill Cook, Hines, and Lodge in March 2003, and acquitted Hinkson on each of the other counts.

Motion for a New Trial

Hinkson timely moved for a new trial under Federal Rule of Criminal Procedure 33 based, in relevant part, on "newly discovered evidence" that Swisher's "Replacement DD-214" form was forged and that Swisher committed perjury regarding his military record.[15] Hinkson accompanied his motion with affidavits

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[15] Hinkson makes no claim the government produced testimony it knew was perjured. *See Napue v. Illinois*, 360 U.S. 264 (1959).

from (1) Chief Warrant Officer W. E. Miller, the Marine Corps liaison to the National Personnel Records Center ("Miller affidavit"), and (2) Col. Woodring, whose signature was affixed to the Woodring letter that validated the Swisher-produced "Replacement DD-214" form, as well as that apparently bogus "Replacement DD-214" form itself ("Woodring affidavit").

The Miller affidavit averred Swisher was never awarded any of the medals he claimed, and that he was injured in a private motor vehicle accident in Washington state. The Miller affidavit further stated that the Swisher-produced "Replacement DD-214" form was forged.

The Woodring affidavit averred Col. Woodring had never signed the letter in Swisher's file that Swisher provided Keeley when seeking veterans benefits, and that the signature in the letter had been artificially superimposed. The Woodring affidavit also averred that Col. Woodring never signed Swisher's purported "Replacement DD-214" form.[16]

The district court denied Hinkson's motion for a new trial. The order denying Hinkson's motion for a new trial stated the trial court's findings that Hinkson failed to meet his burden of demonstrating a right to a new trial based on the five factors discussed in

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[16] Based on this evidence, on August 30, 2007, a jury convicted Swisher of wearing an unearned medal in violation of 18 U.S.C. § 704(a) and other related offenses.

United States v. Harrington, 410 F.3d 598 (9th Cir. 2005). The *Harrington* factors are:

> (1) the evidence must be newly discovered;
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> (2) the failure to discover the evidence sooner must not be the result of the defendant's lack of diligence;
>
> (3) the evidence must be "material" to the issues at trial;
>
> (4) the evidence may not be (a) cumulative or (b) "merely impeaching"; *and*
>
> (5) the evidence must indicate that a new trial would "probably" result in acquittal.

Id. at 601.

First, the district court held "most" of the now-proffered evidence in the Miller and Woodring affidavits was not "newly discovered" because it contained no new information but only the substance of the evidence Hinkson had attempted to introduce at trial: that Swisher did not have the military record he claimed and was not entitled to the honors he testified he won. The court thus found the evidence offered nothing substantively "new."

Second, the district court concluded Hinkson had not been diligent in acquiring the evidence contained in the Miller and Woodring affidavits. The court pointed out that Hinkson's attorney stated during trial that he had been investigating Swisher's military record for "quite some time" because he was

doubtful, given Swisher's 1937 birth date, that Swisher had served in the 1950-53 Korean War. Further, the court noted that Swisher had testified, as a party witness in an October 2004 deposition – three months before Hinkson's trial on murder solicitation charges – to his claimed, but perhaps bogus, military record. That deposition was taken by the same attorney who represented Hinkson in his criminal trial. In addition, the court related that Swisher had testified to the same Korean War combat experience in his appearances before the federal grand jury investigating Hinkson's tax and solicitation crimes, and the government had delivered transcripts of Swisher's grand jury testimony to Hinkson a week before this case came on for trial. The court thus found Hinkson had sufficient opportunity and time to uncover and produce the evidence contained in the Miller and Woodring affidavits before the end of trial.

Third, the district court held Hinkson's proffered evidence was not "material" to the issues at trial because the evidence was inadmissible under Federal Rule of Evidence 608(b) as extrinsic evidence offered to impeach a witness on a specific instance of untruthfulness. The court also reiterated its earlier holding that the evidence was excludable under the Federal Rule of Evidence 403.

Fourth, the district court found the proffered evidence was both cumulative of evidence proffered at trial and "merely impeaching." The court found the evidence cumulative because it repeated Hinkson's attorney's assertions that Swisher was not the

military hero he claimed to be, assertions Hinkson made at trial based on Swisher's age. The court found the evidence "merely impeaching" because it did nothing more than attack Swisher's credibility regarding his military service rather than his testimony regarding the solicitations charged. Further, the Court found Hinkson had several other opportunities to question Swisher's credibility, based on (1) Swisher's youth at the time of the Korean War, (2) Swisher's ongoing feud with Hinkson over WaterOz, and (3) Hinkson's opportunity to show the Dowling letter to Swisher in a re-opened cross-examination of Swisher (an offer Hinkson's attorney had declined).

Fifth, the district court found the proffered evidence did not indicate a new trial would "probably" result in acquittal, because the evidence would be inadmissible on such new trial under Federal Rule of Evidence 403 or 608(b). Also, the court had ordered *all* testimony regarding Swisher's Purple Heart stricken from the record and instructed the jury to disregard it, so the Miller and Woodring affidavits could have no practical effect on the jury's deliberations; Swisher's claim to the Purple Heart was no longer before the jury.

Hinkson timely appealed his conviction on three grounds. First, Hinkson contends he was entitled to a new trial based on his discovery of the Miller and Woodring affidavits, which Hinkson contends conclusively established Swisher lied about his military

record.[17] Second, Hinkson contends the district court erred by precluding Hinkson from introducing the Dowling letter and Swisher's military file into evidence during trial. Third, Hinkson contends the government engaged in prosecutorial misconduct by mentioning Swisher's military service in its closing argument when it had reason to doubt Swisher's truthfulness.

* * *

Analysis

Motion for a New Trial

We review a district court's order denying a motion for a new trial made on the ground of newly discovered evidence for abuse of discretion. *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992). We invoke that standard of review as we have hundreds of times before, but this case forces us to step back and consider precisely what "abuse of discretion" means, in the context of a trial court's factual findings, as applied to legal rules.

In this case, the district court's analysis of Hinkson's motion for new trial involved an application of fact to law – whether the facts as they occurred at trial, combined with Hinkson's purported "newly

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[17] Hinkson appeals the district court's denial of his motion for a new trial *solely* based on Hinkson's contention the district court erred in its consideration of his claimed "newly discovered" evidence of the Miller and Woodring affidavits.

discovered" evidence, warranted a new trial under controlling law. We review applications of fact to law in one of two ways: if the district court's application of fact to law "requires an inquiry that is essentially factual," we review it as if it were a factual finding; if the district court's application of fact to law requires reference to "the values that animate legal principles," we review it as if it were a legal finding. *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984). Here, the entirety of the district court's analysis rested on the specific facts as they occurred at trial and the relative factual importance of Hinkson's purported "newly discovered" evidence. The court's analysis did not rest on "the values that animate legal principles," such as the meaning of due diligence or the conceptual basis for granting new trials, but instead was, in all respects, "essentially factual." Accordingly, for standard of review purposes, we treat the district court's application of fact to law here exactly the same way as we treat factual findings.

The Supreme Court explained the meaning of the abuse of discretion standard in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), where the court stated, "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Id.* at 405. In other words, the Court defined abuse of discretion review of factual findings in terms of "clearly erroneous" review, holding that "[w]hen an appellate court reviews a district court's

factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Id.* at 400-01.

When considering whether a district court erred in applying law to facts, we look to the substance of the issue on review to determine if the question is factual or legal. "If application of the rule of law to the facts requires an inquiry that is 'essentially factual,' – one that is founded 'on the application of the fact-finding tribunal's experience with the mainsprings of human conduct,' – the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard." *McConney*, 728 F.2d at 1202 (quoting *Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960) (internal citation omitted)). This category includes questions such as motive, intent, and negligence. *See id.* at 1203-04. "If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." *Id.* at 1202. This category includes questions such as whether defendants' conduct constituted a conspiracy in violation

of the Sherman Act, and questions that implicate constitutional rights. *Id.*

When reviewing factual findings, the Supreme Court has held that "a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The *U.S. Gypsum Co.* definition of "clearly erroneous" review permits an appellate court to find a trial court's factual determination is clearly erroneous – regardless whether there is some record evidence on which the trial court grounded that determination – if the court of appeals decides, "definitely and firmly," that the trial court made a "mistake." The Court has repeatedly affirmed the *U.S. Gypsum Co.* explanation of the clearly erroneous standard of review. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (noting that under the "clear error" standard of review, "a reviewing court must ask 'whether, on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed'").

The year after *U.S. Gypsum Co.*, however, the Supreme Court held in *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), that a trial court's "choice between two permissible views of the weight of evidence is not 'clearly erroneous'" where the evidence "would support a conclusion either way." This contrasts with the notion expressed in *U.S. Gypsum Co.* that a reviewing court may reverse as clearly

erroneous a trial court's factual findings whenever the reviewing court develops a "definite and firm conviction" that the trial court made a "mistake." Yet, as with the *U.S. Gypsum Co.* explanation of clearly erroneous review, the Supreme Court has also repeatedly affirmed the *Yellow Cab Co.* definition of "clearly erroneous" review. *See, e.g., Cooter & Gell*, 496 U.S. at 400-401 (1990) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Because the Supreme Court has maintained both the *Yellow Cab Co.* and *U.S. Gypsum Co.* definitions of "clearly erroneous" review, our court currently holds that "[a] district court abuses its discretion when it makes an error of law, rests its decision on clearly erroneous findings of fact, or when we are left with 'a definite and firm conviction that the district court committed a clear error of judgment.'" *United States v. 4.85 Acres of Land, More or Less, Situated in Lincoln County, Mont.*, 546 F.3d 613, 617 (9th Cir. 2008). This present standard, particularly given the final clause, is so broad as to provide us with little effective direction as to when we can exercise our power to reverse a district court's factual finding. Despite the wide latitude seemingly provided to appellate courts by *U.S. Gypsum Co.*'s "definite and firm conviction" definition of clear error, we know from *Yellow Cab Co.* and its progeny that our review of a factual finding may *not* look to what we would have done had we been in the trial court's place in the first instance, because that review would be de novo

and without deference. Rather, the scope of our review limits us to determining whether the trial court reached a decision that falls within any of the permissible choices the court could have made. In other words, the Supreme Court's precedent convinces us that any "definite and firm conviction" of the reviewing court must still include some measure of deference to the trial court's factual determinations.

This principle is illustrated in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). In *Anderson,* the trial court had made a series of factual findings from which it concluded the female candidate for Recreation Director was skipped over for the job due to her gender, all in violation of Title VII of the Civil Rights Act of 1964.

On appeal, the Fourth Circuit, after giving "close scrutiny of the record," *Anderson*, 470 U.S. at 571, made findings contrary to those of the trial court: the court of appeals found that the female candidate was not, in fact, the most qualified candidate, and that, according to its own weighing of the evidence, the selection committee had not been biased against the candidate because she was a woman. Thus, the appellate court held the district court's factual findings were clearly erroneous, and reversed.

Considering the analyses of both the trial court and the appellate court, the Supreme Court concluded that "[e]ach has support in inferences that may be drawn from the facts in the record" and neither was "illogical or implausible." *Id.* at 577. Because all the

reasons for appellate court deference to trial court factual findings frame the proper issue as whether the *trial court*'s findings – not the appellate court's – were clearly erroneous, the Court held the court of appeals had erred in concluding the trial court's findings were clearly erroneous; the appellate court's contrary findings were just as much a "permissible" view of the evidence as the trial court's. *See id.* at 574.

Thus, in *Anderson,* the Court held a trial court's findings were *not* clearly erroneous even though the court of appeals had developed a "definite and firm conviction that a mistake has been committed," *id.* at 573, because the trial court's "permissible" findings were not "illogical or implausible" and had "support in inferences that may be drawn from the facts in the record." *Id.* at 577. It follows that even when a court of appeals determines a trial court's findings are "permissible" (*Yellow Cab Co.*) or not a "mistake" (*U.S. Gypsum Co.*), the court of appeals must *reverse* if the district court's determination is "illogical or implausible" or lacks "support in inferences that may be drawn from facts in the record."

In sum, this analysis leads us to conclude that, by way of the *Anderson* case, we can create an objective abuse of discretion test that brings the *Yellow Cab Co.* and *U.S. Gypsum Co.* lines of cases together.

Our Abuse of Discretion Test

We adopt a two-part test to determine objectively whether a district court has abused its discretion in denying a motion for a new trial.

The Supreme Court has held that a district court abuses its discretion when it makes an error of law. *Cooter & Gell*, 496 U.S. at 405 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. . . ."). Thus, the first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested.[18] If the trial court failed to do so, we must conclude it abused its discretion.

If the trial court identified the correct legal rule, we move to the second step of our abuse of discretion test. This step deals with the tension between the Supreme Court's holding that we may reverse a discretionary trial court factual finding[19] if we are "left with the definite and firm conviction that a mistake has been committed," *U.S. Gypsum Co.*, 333 U.S. at 395, and its holding that we may not simply substitute our view for that of the district court, but rather must give the district court's findings deference, *see*

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[18] Here, for instance, the correct legal rule for analyzing a motion for a new trial based on "newly discovered" evidence is found in the *Harrington* test.

[19] Or "essentially factual" application of fact to law. *See McConney*, 728 F.2d at 1202.

Nat'l Hockey League, 427 U.S. at 642. Resolving that tension by reference to *Anderson*, we hold that the second step of our abuse of discretion test is to determine whether the trial court's application of the correct legal standard was (1) "illogical," (2) "implausible," or (3) without "support in inferences that may be drawn from the facts in the record."[20] *Anderson*,

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[20] We do not think this test is redundant of the previous, conflicting explanations of clearly erroneous review: that the court of appeals must affirm a district court factual finding that is "permissible" (*Yellow Cab Co.*), but that the court of appeals must reverse a district court's factual finding any time it "has a definite and firm conviction that a mistake has been made" (*U.S. Gypsum Co.*).

First, according to Merriam-Webster, the word "permissible" simply means "allowable." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, "permissible" (11th ed. 2008). But: what kind of a district court determination is "allowable"? The word itself provides no objective answer, and thus a court of appeals might be bound to affirm a trial court's finding that reflected the trial court's subjective determination or whim. Our invocation of *Anderson* at the second step of our abuse of discretion test removes this risk by providing a more firm, objective guide to determine what kind of factual finding should be affirmed.

Second, the "definite and firm conviction" standard essentially requires the court of appeals to decide with "conviction" that "a mistake has been made." But: how is the court of appeals to know what constitutes a "mistake"? Again, the answer is: a determination that is illogical, implausible, or without basis in the record. Once more, this test gives body to the otherwise totally open-ended standard that a court of appeals may reverse a district court's "mistake."

Finally, we must remember the Supreme Court itself used the factors outlined in our abuse of discretion test to formulate its analysis in *Anderson*, and used those factors in a fashion that

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470 U.S. at 577. If any of these three apply, only then are we able to have a "definite and firm conviction" that the district court reached a conclusion that was a "mistake" or was not among its "permissible" options, and thus that it abused its discretion by making a clearly erroneous finding of fact.[21]

A significantly deferential test that looks to whether the district court reaches a result that is illogical, implausible, or without support in inferences

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was not redundant or cumulative of the other explanations the Court gave for the clearly erroneous standard of review.

[21] This view of our test for abuse of discretion review – one that looks to whether the district court reaches a result that is illogical, implausible, or without support in inferences that may be drawn from the facts in the record – is one that already has partial support in a number of our cases and in those of other circuits. *See, e.g., Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 387 (9th Cir. 1993) ("The court's decision . . . is not implausible and, based upon this factor alone, the court's decision would not be considered an abuse of discretion."); *see also Savic v. United States*, 918 F.2d 696, 700 (7th Cir. 1990) ("A finding is clearly erroneous when, although there may be some evidence to support it, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' We may have such a conviction if the trial judge's interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence.'") (citations omitted), *cert. den.*, 502 U.S. 813 (1991); *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001) ("A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole."); *Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 634 (6th Cir. 2000) ("[W]e cannot conclude that the district court's decision was so unreasonable, illogical, or arbitrary as to constitute an abuse of discretion.").

that may be drawn from the record makes particularly good sense in the context of a motion for new trial. *See United States v. Heath*, 260 F.2d 623, 626 (9th Cir. 1958) ("To prevent possible prejudice on trial beyond the general atmosphere of impartiality which traditionally pervades the courtroom, trial judges have wide discretion to methods of control. Among these are . . . grant of new trial."); *Freund v. Nycomed Amersham*, 347 F.3d 752, 765 (9th Cir. 2003) ("The district court is most familiar with the context of the trial, and enjoys broad discretion with regard to a new trial motion."); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court.").

Accordingly, we hold that when we review for abuse of discretion a district court's denial of a motion for a new trial, we first look to whether the trial court identified and applied the correct legal rule to the relief requested. Second, we look to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. In other words, our abuse of discretion test means that we do not automatically *affirm* a district court's factual finding if we decide it is "permissible," and we do not automatically *reverse* a district court's factual finding if we decide a

"mistake has been committed." Rather, in either case, we will affirm a district court's factual finding[22] unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record.[23]

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[22] Or "essentially factual" application of fact to law. *See McConney*, 728 F.2d at 1202.

[23] Appellate review of a district court's decision to abstain from exercising jurisdiction over a case is not altered by our opinion today. A district court's decision to abstain from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971), is reviewed de novo in this circuit. *World Famous Drinking Emporium Inc. v. Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987). Moreover, in abstention cases arising under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), "abuse of discretion" is a phrase used exclusively to perform a legal question analysis, not an analysis of factual findings. For example, in *Pullman*, the Supreme Court held, *sua sponte*, that the district court "should have exercised its wise discretion" to abstain from exercising jurisdiction, because a state statute could potentially decide the issue, a state court had not yet interpreted that state statute, and the application of that state statute could avoid the federal constitutional question in the case. These were all legal, not factual, issues.

In the rare case in which a district court's factual findings *do* affect its decision to apply the abstention doctrine, those factual findings would be reviewed for abuse of discretion as we clarify that standard today. For example, in *Pullman*, suppose a porter sues the Texas Railroad Commission in district court, and in its first response to the complaint, the Commission moves to dismiss on grounds the plaintiff is not actually a certified porter and has no standing to sue. The porter submits a certification document which the Commission claims is bogus. The district court's ruling on the authenticity of the document, crucial to its decision on standing, would be reviewed for abuse of discretion. It would make no sense to review the district court's factual

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Application of Our Abuse of Discretion Test

Applying this test to the case at bar, we conclude the district court did not abuse its discretion in denying Hinkson's motion for a new trial based on "newly discovered" evidence of the Miller affidavit (which averred Swisher was never awarded any of the medals he claimed, that he was injured in a private motor vehicle accident in Washington state, and that the purported "Replacement DD-214" form Swisher produced on the stand was forged) and the Woodring affidavit (which averred Col. Woodring never signed the letter in Swisher's file that Swisher provided Keeley when seeking veterans benefits, and that Col. Woodring never signed Swisher's purported "Replacement DD-214" form, which Swisher produced on the witness stand).

First, we look to whether the district court identified the correct legal standard. Here, the district court accurately identified the correct five-part legal test outlined in *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005), to analyze Hinkson's motion

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finding under a standard other than the abuse of discretion standard we announce today. If we attempted a de novo review of that factual finding, we would be straying far from our role as an appellate court. Rather, the sensible approach is to uphold the trial court's finding of fact, provided that finding is not illogical, implausible, or without any support in the record.

for a new trial brought on the basis of newly discovered evidence.[24]

The *Harrington* test requires a party seeking a new trial to prove each of the following: (1) the evidence is newly discovered; (2) the defendant was diligent in seeking the evidence; (3) the evidence is material to the issues at trial; (4) the evidence is not (a) cumulative or (b) merely impeaching; and (5) the evidence indicates the defendant would probably be acquitted in a new trial. *Id.*

Second, because the *Harrington* test is essentially factual, requiring considerations that are "founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," rather than requiring "consideration of abstract legal principles," *McConney*, 728 F.2d at 1202, we look to whether the district court's findings of fact, and its application of those findings of fact to the *Harrington* factors, were illogical, implausible, or without support in inferences that may be drawn from facts in the record.

Under the initial step of the *Harrington* test, the district court found the Miller and Woodring affidavits did not contain "newly discovered" evidence because the substance of the affidavits was simply not "newly discovered." The district court found that

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[24] The district court cited to *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003), which used the same test as did *Harrington*.

the information contained in the Miller and Woodring affidavits, while newly written, did not provide any new *information* that was not already considered and rejected from evidentiary admission by the court: the affidavits merely supported the previously proffered evidence that Swisher's purported "Replacement DD-214" form was phoney and that he had not earned any medals. The district court's determination the proffered affidavit evidence was not "newly discovered" was logical and plausible, based on the facts in the record. Thus, the court's conclusion did not constitute a clearly erroneous factual finding nor an abuse of discretion.

Second, the district court found Hinkson's counsel was not diligent in seeking the purported newly discovered evidence, as required by the second *Harrington* step, because, before his re-opened cross-examination of Swisher at trial on January 14, 2005, counsel told the court he had been investigating Swisher's military record for "quite some time." In fact, three months before trial, the same counsel had represented Hinkson in a civil action in which Hinkson and Swisher were bitter adversaries, and had deposed Swisher. At his deposition, Swisher claimed battlefield injuries from grenade explosions and that he was born in 1937, putting him at age 13-16 during the 1950-53 Korean War.[25] (The government also disclosed Swisher's grand jury testimony a week

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[25] The minimum age for enlistment in the Armed Forces during the Korean War was 18, or 17 with parental consent. *See* 10 U.S.C. §§ 628, 634 (1952).

before trial, in which Swisher made the same claims.) Yet, counsel still did not procure the Miller and Woodring affidavits (much less Miller and Woodring's presence as witnesses) until February 24 and 27, more than a month after the first cross-examination of Swisher and nearly four months after suspicions first should have been raised by Swisher's deposition testimony in the civil action. Nor did Hinkson's counsel request a continuance during trial to seek out the proof contained in the Miller and Woodring affidavits, which was precisely the evidence the district court said might help it understand Swisher's true military record. Based on these facts, the district court's finding that Hinkson's attorney did not exercise due diligence in seeking authoritative evidence of Swisher's true military past was logical, plausible, and based on inferences drawn from the facts in the record. Thus, it was not a clearly erroneous finding nor an abuse of discretion.[26]

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[26] The dissent confuses the issue by stating that it was the government that was not diligent in investigating the record of its star witness at trial. The issue is *not* what the government should or should not have done to assist defense counsel in determining whether Swisher was lying about his military record (a fact that is not material to the underlying issue at trial). *Harrington* asks this: did *defense counsel* act diligently in pursuing the evidence it wishes to proffer at a new trial? *Harrington*, 410 F.3d at 601. Defense counsel waited *months* after being put on notice Swisher's military service claims could be bogus before procuring the Woodring and Miller affidavits and failed to even request a continuance from the district court in the interim. The district court correctly found that defense counsel was not diligent.

Third, the district court found the Woodring and Miller affidavits were not material to the case in any event, as required by the next *Harrington* step, because they related evidence that would be inadmissible under Federal Rule of Evidence 403. The district court found the probative value of the evidence described in the Miller and Woodring affidavits was substantially outweighed by the danger of confusion of the issues, misleading the jury, undue delay, and waste of time. After all, the material point was whether Swisher *told* Hinkson he had killed men in battle, not whether he had actually done so; the relevancy was to whether Hinkson offered Swisher money to kill three targets of Hinkson's ire.[27] The district court concluded that substantial time waste and confusion would result from proof of authentication and explanation of the documents, and all for a tangential issue unrelated to the factual issues to be resolved by the jury. This conclusion, which rests within the traditional powers given to trial judges to conduct trials, was based on plausible inferences from facts in the record, especially given the district court's advantage in determining how to run its courtroom

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[27] This is a similar issue to that which arises in cases where undercover police officers sell cocaine-labeled powdered sugar to unsuspecting purchasers, who are then charged with attempted purchase of a controlled substance; the only relevant question is whether the purchaser thought he was buying cocaine, not whether it was indeed cocaine that was purchased. *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978).

efficiently. Thus, it was not a clearly erroneous finding nor an abuse of the court's discretion.

Fourth, as discussed above, the district court found the Miller and Woodring affidavits offered no new information beyond that which had already been proffered for admission into evidence but rejected as inadmissible – that Swisher had not won any decorations during the Korean War and that his purported "Replacement DD-214" was bogus. For that reason, the district court concluded the information in the claimed "newly discovered" evidence was cumulative of information proffered during trial. Thus, the court found a new trial unnecessary under the fourth *Harrington* step, which requires the "newly discovered" evidence not be "cumulative."

The only new fact revealed by the Miller and Woodring affidavits was that the Woodring signature on the Swisher-produced "Replacement DD-214" form was a forgery. However, Hinkson's attorney had already proffered evidence that such "Replacement DD-214" form was a forgery, in the form of the Tolbert and Dowling letters. Accordingly, the district court's conclusion that, based on the facts in the record, the information contained in the Miller and Woodring affidavits was cumulative of information in previously proffered evidence, was not illogical or implausible.

Further, the district court found the evidence served no purpose other than to impeach Swisher, which also doomed Hinkson's new trial motion under the fourth step of the *Harrington* test. Hinkson

contends Swisher was a critical witness for the government's case, so any impeachment of his credibility would have undermined the government's entire case. But, even if Hinkson's contention were not post-hoc speculation, it does not change the fact that evidentiary admission of the extrinsic Miller and Woodring affidavits would serve no purpose other than to impeach Swisher's testimony as to his military record rather than his testimony as to Hinkson's solicitations. It is not material whether Swisher's wearing of a miniature Purple Heart when he testified constituted a statement regarding his military service, because the Miller and Woodring affidavits would serve only to impeach that statement, and thus still not constitute evidence that Swisher did not portray himself as a grizzled combat killer to Hinkson or that Hinkson did not solicit Swisher to kill the three targeted individuals. Thus, the district court's finding that the "newly discovered" evidence served only to impeach Swisher's testimony was logical, plausible, and based entirely on the facts in the record. Consequently, it was not a clearly erroneous finding nor an abuse of discretion.

Finally, the district court found that because the government's theory of the case was simply that Hinkson believed Swisher was a battlefield veteran, and not that Swisher actually was one, the evidence described in the Woodring and Miller affidavits did not make it probable the jury would acquit on retrial, as required by the fifth step of the *Harrington* test. At most, the affidavits related evidence that Swisher

was a liar with regard to his military past. But extrinsic evidence that someone lied about a particular event in his past – such as the extent of his military service – is, as discussed, excludable under Rule 403. So, what effect on a jury could excluded evidence have? None. Thus, the district court's finding that the "newly discovered" evidence was not likely to change the result in a re-trial was logical based on its evidentiary ruling and its plausible interpretation of the facts in the record.[28] Therefore, it was not a clearly erroneous finding nor an abuse of discretion.

Accordingly, the district court (1) identified the correct legal standard to analyze Hinkson's motion for a new trial, and (2) the court's findings of fact, and its application of those findings of fact to the correct legal standard, were not illogical, implausible, or without support in inferences that may be drawn from the facts in the record. Therefore, the district court did not abuse its discretion in denying Hinkson's new trial motion.

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[28] It is speculation to conclude acknowledgment of Swisher's routine, rather than heroic, military history would cause the government to keep him off the stand on a retrial. Prosecutors are accustomed to proving their cases through unsavory individuals, and a timely pre-trial motion would limit questioning about Swisher's military history other than as told to Hinkson. As the dissent states at length, Swisher's credibility could *now* be impeached additionally by proof of his conviction for wearing an unearned medal. But that conviction had not occurred at the time of Hinkson's new trial motion and could play no part in the trial judge's estimation of the probable result of a new trial. The trial judge did not err.

Exclusion of Evidence at Trial

Hinkson also contends the district court violated his constitutional rights to present a defense, to confront witnesses against him, and to a fair trial because the district court incorrectly refused to admit into evidence the Dowling letter (which stated Swisher's "Replacement DD-214" form was not in Swisher's official military file) and Swisher's official military file itself, which the district court found to be unauthenticated and indecipherable. The district court found this evidence inadmissible under Federal Rules of Evidence 403 and 608(b). Because we hold the district court did not abuse its discretion when it excluded the evidence under Rule 403, we need not reach the issue raised under Rule 608(b).

Hinkson contends the district court erred by excluding the Dowling letter and Swisher's military file from evidence under Rule 403. A district court's Rule 403 determination is subject to great deference, because "the considerations arising under Rule 403 are 'susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.'" *R.B. Matthews, Inc. v. Transamerica Transp. Serv., Inc.*, 945 F.2d 269, 272 (9th Cir. 1991). Here, the district court weighed the limited probative value of the evidence – to impeach testimony by Swisher about his Purple Heart medal, which testimony the jury had already been instructed to disregard – against the time it would take to authenticate and explain the military file (which the court found facially indecipherable) and the risk of

confusing the jury with the tangential evidence. The court concluded the risk substantially outweighed the reward, and this conclusion, which was not illogical nor implausible based on the record, did not exceed the bounds of the district court's discretion in applying Rule 403.

Error in Closing Argument

Hinkson contends the district court erred by failing to order a new trial *sua sponte* after the government's closing argument because the prosecutor, knowing that Swisher likely was not a combat veteran, argued to the jury that Swisher *told* Hinkson he was a combat veteran, and that is why Hinkson solicited Swisher to murder Cook, Hines, and Lodge. Review is for plain error because Hinkson failed to object below. *United States v. Olano,* 507 U.S. 725, 731-32 (1993). A plain error is (1) an error (2) that is plain, (3) that affects "substantial rights," and (4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009).

Hinkson's contention lacks merit. The government's only references to Swisher's military background in its closing argument were to point out that Swisher had told Hinkson he was a combat veteran – not that Swisher necessarily was one. Even if Swisher had never served in the military at all, it was enough that the jury found Hinkson *believed* he did. The government did not argue in closing that Swisher

should be deemed more credible or believable on account of his purported military heroism, or that he was more likely to be a murderer-for-hire because of his military record. Accordingly, the district court did not plainly err by failing to order a new trial *sua sponte* after the government's closing argument.

Conclusion

For the reasons discussed above, we affirm the district court's order denying Hinkson's motion for a new trial based on "newly discovered" evidence of the Miller and Woodring affidavits because the district court (1) applied the correct *Harrington* test, and (2) analyzed the *Harrington* factors in a manner that was not illogical, implausible, or without support in inferences that may be drawn from the facts in the record. We also hold the district court did not err by excluding the Dowling letter and Swisher's military file from evidentiary admission under Rule 403. Finally, we hold the district court did not plainly err by failing to order a new trial *sua sponte* after the government's closing argument.

AFFIRMED.

W. FLETCHER, Circuit Judge, dissenting, joined by PREGERSON, WARDLAW, and PAEZ, Circuit Judges:

I dissent.

Following a two-week trial in federal district court in Boise, Idaho, a jury convicted David Roland Hinkson of soliciting the murder of three federal officials. The government's star witness supporting the conviction was Elven Joe Swisher. Wearing a Purple Heart lapel pin on the witness stand, Swisher testified that he had told Hinkson that he was a Korean War combat veteran and that Hinkson, impressed by Swisher's military exploits, solicited him to kill the officials.

The government maintained in its opening statement to the jury that Swisher was a Korean War combat veteran, and it maintained throughout the trial that Hinkson's understanding of Swisher's military exploits showed that he was serious in his solicitations of Swisher. The government now concedes that Swisher neither served in combat nor earned any personal military commendations, and that Swisher presented a forged military document in court and repeatedly lied under oath at trial about his military record.

Hinkson makes three arguments on appeal. First, he argues that the district court wrongly excluded documentary evidence showing that Swisher presented a forged document and lied on the stand. Second, he argues that the prosecutor engaged in

misconduct when he invoked Swisher's military service in his closing argument despite having substantial reason to suspect that Swisher had lied about that service. Third, he argues that the district court abused its discretion in denying his motion for a new trial based upon his discovery after trial of new evidence conclusively establishing that Swisher had lied on the stand.

I would reverse the district court based on Hinkson's first and third arguments. I would hold that the district court abused its discretion when it excluded documentary evidence that would have contradicted Swisher's claim on the stand that he was a decorated combat veteran. I would also hold that the district court abused its discretion when it denied Hinkson's motion for a new trial. I would not reach Hinkson's second argument.

I. Background

The majority opinion recites some of the background facts relevant to Hinkson's appeal. In my view, however, the majority's recitation is too truncated. I begin by providing the background necessary to understand what went on during Hinkson's trial, and to understand why I believe the district court abused its discretion.

In an indictment filed on September 21, 2004, a federal grand jury in Idaho charged Hinkson with soliciting the murders of Assistant U.S. Attorney Nancy Cook, IRS Special Agent Steven Hines, and

U.S. District Court Judge Edward J. Lodge. All three officials had been involved in the investigation and prosecution of Hinkson on tax and currency structuring charges. Hinkson appealed his conviction on those charges in a companion case. The three-judge panel of which I was a member affirmed that conviction in a separate memorandum disposition.

The superseding indictment in the case now before us contained eleven counts. Counts 1-6 charged that Hinkson, in violation of 18 U.S.C. § 373, sought to persuade an acquaintance named James Harding to murder Cook, Hines, and Lodge, first in January 2003 (Counts 1-3) and again in March 2003 (Counts 4-6). Counts 7-9 charged that in December 2002 or January 2003, Hinkson, again in violation of § 373, sought to persuade Swisher to murder Cook, Hines, and Lodge. Finally, Counts 10 and 11 charged that Hinkson, in violation of 18 U.S.C. § 115, personally threatened to kill the children of Cook and Hines.

Hinkson was convicted on only the Swisher-related counts, Counts 7-9. The jury acquitted Hinkson on Counts 1-3, 10, and 11, and deadlocked on Counts 4-6. This appeal involves only the Swisher-related counts.

At several points during Hinkson's trial the prosecutor emphasized Swisher's military background, and Hinkson's understanding of that background, in an effort to show the seriousness of Hinkson's solicitations. In his opening statement to the jury on January 11, 2005, the prosecutor stated affirmatively

that Swisher "was a Marine, a Combat Veteran from Korea during the Korean conflict. He was not adverse to this kind of violent, dangerous activity; but he wanted no part of murdering federal officials." However, during direct examination of Swisher three days later on January 14, the prosecutor did not ask Swisher whether he was, in fact, a Korean War combat veteran. Somewhat oddly, given his affirmative statement to the jury only three days earlier, the prosecutor asked Swisher only *what he had told Hinkson* about his military experience in Korea.

Swisher came to the witness stand wearing a replica of a Purple Heart on his lapel. A Purple Heart is an award given to members of the United States military who are wounded in combat. Swisher testified that he first became acquainted with Hinkson in 2000. According to Swisher, he had done some consulting work for Hinkson's company, WaterOz, and the two men had developed a friendship. Swisher testified that he had served in the Marine Corps. In response to the prosecutor's questions, he testified further that he discussed his military exploits with Hinkson on several occasions and told Hinkson that he had been in combat in Korea as a Marine. According to Swisher, Hinkson had asked whether he had ever killed anyone, to which Swisher said he had responded, "Too many."

Swisher testified that on various occasions in 2001 and early 2002, he and Hinkson discussed Hinkson's legal problems, particularly a civil suit brought against Hinkson by a former WaterOz employee.

Swisher testified that shortly after April 2002, Hinkson expressed "considerable" anger toward the employee's lawyer, Dennis Albers, and spoke in graphic detail about wanting to see Albers and his family "tortured and killed." Swisher testified that Hinkson offered him "$10,000 a head to do it," but Swisher "told [Hinkson] he was out of his mind and he needed to knock that kind of BS off."

Swisher testified that in July or August of 2002, Hinkson began to focus on his problems with federal officials. According to Swisher, Hinkson stated that Cook and Hines "had been harassing him a great deal," "abused the judicial system," "cost him a lot of money," and "didn't deserve to live." Swisher testified that Hinkson asked him if he "remembered the offer he made regarding Mr. Albers and his family" and "said he wanted that done, basically, with Ms. Cook and her family and Mr. Hines and his family." Swisher testified that Hinkson told him, "I know you're used to it. I mean, you have killed people [while serving in the military]." Swisher testified that he replied that he would report Hinkson to the authorities if Hinkson "continue[d] talking that way."

Swisher testified that after Hinkson was arrested on tax charges in November 2002, he had further conversations with Hinkson. According to Swisher, Hinkson "was extremely hostile to all of the people who had been involved in that arrest." In January 2003, Hinkson "went through the names of the people that had offended him, and added a federal judge by the name of Lodge to that list." Swisher testified that

Hinkson then offered him "[a]t least $10,000 a head" to have "them all treated the way that the initial offer regarding Albers and his family had been handled" – that is, "[t]ortured and killed." Swisher testified that Hinkson spoke in a "pleading fashion" about how "he just had to have this done." Swisher replied that he "never wanted to hear that again." After the January 2003 exchange, the two men had a serious falling-out, eventually resulting in a lawsuit and a nasty feud. Swisher testified that sometime after April 2003 he reported Hinkson's solicitations to a local Idaho prosecutor. At time of his testimony at Hinkson's trial in January 2005, Swisher was a bitter enemy.

On cross examination, defense counsel initially did not inquire into Swisher's military background. Instead, counsel sought to discredit Swisher by identifying inconsistencies in his testimony and by emphasizing the ongoing feud between Swisher and Hinkson. However, after having indicated that he had no further questions for Swisher, counsel asked to approach the bench. At the sidebar, he told the court, "For quite some time, [the defense has] been trying to dig into [Swisher's] military history." Counsel explained that, "[b]ecause of his age and because of the time of the war, we don't believe he was in the war. We also don't believe that he got a Purple Heart or was in combat." Counsel then told the court that he had just been "handed a letter from the National Personnel Records Center indicating that . . . the records fail to show that [Swisher] ever was recommended for or awarded any person[al] decorations."

Defense counsel noted for the record that Swisher was "wearing a Purple Heart on the witness stand, in the presence of the jury."

Still at the sidebar, the prosecutor responded that he never asked Swisher about "winning medals or combat" and had merely asked about "a conversation that [Swisher] had with Mr. Hinkson and what Mr. Hinkson asked him about." The prosecutor did not mention that three days earlier, in his opening statement to the jury, he had affirmatively stated that Swisher was a combat veteran from the Korean War. The prosecutor also stated at the sidebar, "For the record, he has a little – I don't know – you know, something stuck in his lapel. If somebody knows what that is, fine. No one has said what it is."

The court permitted the defense to reopen its cross examination of Swisher in order to ask about Swisher's lapel pin and about his service during the Korean War. In response to defense counsel's questions, Swisher testified that he was wearing "a Purple Heart Medal" that had been awarded to him by the U.S. government. He then explained that he had served in combat "[n]ot in the Korean War but following the Korean War." He said, "I was part of a special expedition, Marine Corps Expeditionary Unit that was engaged in combat after the Armistice, in an attempt to free POWs still in secret prison camps in North Korea. And that information still remains classified, so I'm not sure how much more I can say on that."

Over the prosecutor's objection, defense counsel then showed Swisher the just-received letter from the National Personnel Records Center. The letter was dated the day of the cross examination and had been faxed to defense counsel's office at 2:34 p.m. that afternoon. The letter was signed by Archives Technician Bruce R. Tolbert. The letter (hereinafter the "Tolbert letter") stated:

> [A] U.S. Marine Corps record was located on file at this Center for Mr. Swisher based on the information provided in your request. The USMC record shows Mr. Swisher served on active duty in the USMC from August 4, 1954 to his release from active duty on August 3, 1957. He was subsequently discharged from the USMC reserves on August 3, 1962. In addition, Mr. Swisher's Marine Corps record has been carefully examined by the Military Awards Branch of the office of the Commandant of the Marine Corps, and that office has stated that his record fails to show that he was ever recommended for, or awarded any personal decorations.

Defense counsel asked Swisher whether the letter "might refresh [his] recollection as to whether or not the Government issued [him] a Purple Heart."

After Swisher reviewed the letter, the following exchange took place:

> Q [by defense counsel]: Now, sir, when you are awarded a Purple Heart, are you not

given a document reflecting your entitlement to that Purple Heart?

A [by Swisher]: Commonly.

Q: Were you given such a document?

A: Yes.

Q: Where is that document?

A: In my pocket.

Q: May I see it, please?

A: I have a replacement DD-214, if the court will permit me to –

THE COURT: Let me take a look at it, first.

THE WITNESS: It is certified. We had to go clear to Headquarters of the Marine Corps and all over to get it. Because of the classifications, my record, along with the other survivors of that Mission, had been pretty much purged.

THE COURT: Ms. Longstreet, would you tender that to both counsel, please?

[THE PROSECUTOR]: I have a copy, Your Honor.

THE COURT: Just hang on to it.

[DEFENSE COUNSEL]: What was that?

[THE PROSECUTOR]: I have a copy.

[DEFENSE COUNSEL]: May we approach, Your Honor?

At sidebar, out of the hearing of the jury, the exchange continued:

> [DEFENSE COUNSEL]: I am going to – apparently, counsel for the government knew about the validity of the Purple Heart. He just said he has a copy of this.
>
> THE COURT: Have you seen this document?
>
> [THE PROSECUTOR]: He showed me this document this morning, about 9:00 o'clock.
>
> THE COURT: Do you have a copy of it?
>
> [THE PROSECUTOR]: I have a copy of it.
>
> [DEFENSE COUNSEL]: Why didn't you tell us?
>
> [THE PROSECUTOR]: Why should I?

Swisher had pulled from his pocket a single sheet of paper, which was a photocopy of a document purporting to be a Defense Department Form 214, described by Swisher in his testimony as a "replacement DD-214." In box 32, near the bottom of the document, was typewritten: "This document replaces the previously issued transfer document of 8-3-57. Changes and additions have been verified by Command. The original of this DD-214 has been forwarded to headquarters MC (10-15-57) . . . Entitled to wear Marine Corps Expeditionary Medal." Near the middle of the document, in box 26, was typewritten: "SILVER STAR, NAVY AND MARINE CORPS MEDAL W/ GOLD STAR, PURPLE HEART, NAVY

AND MARINE CORPS COMMENDATION MEDAL W/ BRONZE 'V'." In box 27, immediately below, was typewritten: "Multiple shrapnel and gunshot – September 1955, Korea." The document bore the signature "W. J. WOODRING, Jr., Capt., USMC."

On the same page, below the photocopy of the purported Form DD-214, was written: "Filed and recorded at the request of Joe Swisher[.] At 2:40 o'clock p.m. this 2nd day of February 2004[.] *ROSE E. GEHRING*[,] Ex-Officio Auditor and Recorder Idaho County, Idaho[.] By Dana Stroop[,] Deputy[.] Fee $0[,] 1 pg." (Underlining indicates handwriting; italics indicates stamp; brackets indicate material added by me.)

The court excused the jury, and the conversation continued. The court asked the prosecutor to confirm that he had seen the document that morning at 9:00 a.m. The prosecutor replied:

> [Swisher] showed it to me at 9:00 a.m. this morning because I had asked – he had mentioned Korea, serving in Korea.
>
> I said, "Wasn't the Armistice in '52?"
>
> He said, "But there was still, you know, combat; and it continues to this day," which I happen to know to be true. There is combat to this day in Korea.

Defense counsel requested a mistrial based on the prosecutor's failure to inform the defense that Swisher had given the government a document that

appeared to contradict the letter from the National Personnel Records Center. The prosecutor responded that defense counsel "should have listened to me when I said, 'Don't go there.'" He elaborated:

> I didn't go into anything about his combat or his medals or anything else on my direct. He chose to go down this path, even when I objected to it.
>
> I didn't draw attention to the little pin in Mr. Swisher's lapel. Lots of people wear them. They could be anything. He wanted to make an issue of it.
>
> . . .
>
> Counsel whipped out his document that he received minutes ago. I believe he probably didn't have enough time to read it and digest it and tried to use that to impeach the witness. That was improper.
>
> . . .
>
> It was a grandstand play in front of the jury that didn't – that wasn't so grand, and he got caught on it. That's where we are.
>
> There is nothing the Government did that caused him to go in the area he did. We tried to avoid going into this area.
>
> I don't think – you know, I barely had time to look at this myself. It refers to other – that this replaces some document previously issued. I don't know what that document is,

> and it just led me to conclude that this is not a proper area to go into.

The court denied the motion for a mistrial, stating:

> The court finds as a matter of fact that if [Swisher's document] is a copy of a genuine military record – and at this point, I don't have any way to determine that; but it appears to be genuine, at least in appearance.
>
> It indicates consistently with how the witness has testified; that he did, in fact, receive multiple shrapnel and gunshot wounds in September 1955 in Korea; and that he was awarded commendations and medals, including the Purple Heart.

The court stated that "until the receipt of the [Tolbert] letter," the government "had no reason to believe that [Swisher's document] was discloseable under Brady or Giglio because it was not impeaching."

The court offered to "instruct the jury to strike that portion of the cross examination of Mr. Swisher that relates to the Purple Heart. Just tell them to completely disregard all testimony about the Purple Heart." Defense counsel agreed. When the jury returned, the court said:

> Ladies and gentlemen, it's been a long day; and I now realize that I made a mistake in allowing the questioning with regard to the Purple Heart Medal.

> So I am going to instruct you to disregard completely all of Mr. Swisher's testimony with regard to that military commendation.
>
> You are certainly entitled to consider all of the rest of his testimony. Just everything from where I asked [defense counsel] to reopen, please strike that from your minds; and you are not to consider it as evidence in the case.

The contretemps over the Tolbert letter and the "replacement DD-214" took place on Friday afternoon, January 14. The following Monday, January 17, was a federal holiday. When the trial resumed on Tuesday, the prosecution rested, and the defense called its first witnesses.

The next day, Wednesday, January 19, defense counsel told the court, outside the presence of the jury, that he had obtained information indicating that the document Swisher had taken from his pocket while on the witness stand – the so-called "replacement DD-214" – was fraudulent. Defense counsel had obtained a photocopy of a different Form DD-214, also recorded by Swisher at the Idaho County Auditor and Recorder's office. However, this Form DD-214 had been recorded in February 2001 rather than February 2004. The earlier-recorded Form DD-214 was identical to the later-recorded form, with the notable difference that none of the medals, commendations, or wounds was mentioned in the earlier-recorded form. "N/A" was written in box 26 where the Silver Star,

Purple Heart, and other awards were specified in the later-recorded form. "N/A" was also written in boxes 27 and 32 where, in the later-recorded form, "Multiple shrapnel and gunshot – September 1955, Korea" and "Entitled to wear Marine Corps Expeditionary Medal" were written.

Defense counsel told the court:

> [T]he indications from the people we have talked to [at the National Personnel Records Center] is that they stand by the [Tolbert] letter of January 14th and that they will provide us with a certified copy of his DD-214 that would not support [Swisher's document]; that [Swisher's document] is a forgery; and that he was never given any of the awards or benefits as indicated on [Swisher's document]; and that, further, if any change had been made in the discharge document, it would have been done on a form DD-215 [rather than a form DD-214]. . . .

Counsel further stated that he believed Swisher had not been wounded in combat but, in fact, had been "injured while in the Service in a car accident in Bremerton, Washington." He stated that the National Personnel Records Center would send Swisher's full military record to the court, but only in response to a subpoena signed by the court. The court signed a subpoena late that day.

Two days later, on Friday morning, January 21, again outside the presence of the jury, the prosecutor provided a photocopy of a letter to the court "for

in-camera review." The letter was from Lieutenant Colonel K.G. Dowling, Assistant Head of the Military Awards Branch of the Marine Corps, to Ben Keeley of the Idaho Division of Veterans Services. The letter (the "Dowling letter") was dated December 30, 2004. What appeared to be a "received" stamp was dated January 10, 2005. At the top of the Dowling letter, now in the possession of the government, was a fax line indicating that it had been faxed from the "ID. STATE VETERANS SVS" in Lewiston, Idaho, where Keeley's office was located, on Thursday, January 13, 2005. January 13 was the day before Swisher took the stand to testify against Hinkson.

The prosecution has given various answers about when it received the Dowling letter or learned of its existence. On the morning of January 21, when he gave the letter to the district court, the prosecutor stated that he "believe[d] Agent Long got [the letter] the day before by going to the Veterans' Administration." Later, in its opposition to Hinkson's motion for a new trial, the prosecution stated in its brief that the letter was "obtained by federal investigators a few days earlier from the Boise Veteran's Affairs office." In its brief to this court, the prosecution stated that "government investigators obtained [the letter] on or about January 20." Finally, in response to the queries during oral argument before the three-judge panel, the government's attorney sent a post-argument letter stating that he had "been informed that investigating agents on the prosecution team first saw and learned of the Dowling letter on January 18 or 19, at

the Boise, Idaho office of the Department of Veteran's Affairs." There is no indication in the record that defense counsel had any idea of the existence of the Dowling letter until the government provided it to the court on January 21.

The Dowling letter indicated that Keeley earlier had contacted the Personnel Management Support Branch of Marine Corps Headquarters, after Swisher attempted to use his "replacement DD-214" to obtain veterans' benefits from the Idaho Division of Veterans Services. Dowling wrote back to Keeley:

> We have thoroughly reviewed the copy of the Certificate of Release or Discharge from Active Duty (DD Form 214) and supporting letter which you submitted on behalf of Mr. Swisher with your request. The documents you provided do not exist in Mr. Swisher's official file. The official DD Form 214 in his record of the same date was signed by Mr. Swisher and does not contain any awards information in box 26, and contains no "wounds" information in box 27. A copy of his official DD 214 is provided as the enclosure. Given this information we have reason to believe that the documents you submitted are not authentic.
>
> Specifically, the DD 214 you submitted on behalf of Mr. Swisher indicates that Mr. Swisher is entitled to the Silver Star Medal, Navy and Marine Corps Medal (Gold Star in lieu of the Second Award), Purple Heart, and Navy and Marine Corps Commendation

Medal with Combat "V." However, our review of his official military records, those of this headquarters, and the Navy Department Board of Decorations and Medals failed to reveal any information that would indicate that he was ever recommended for, or awarded any personal decoration.

Additionally, the Navy and Marine Corps Commendation Medal, which is listed in block 26 of the DD 214 that you submitted did not exist at the time of Mr. Swisher's transfer to the Marine Corps Reserve in 1957. On March 22, 1950, a Metal Pendant was authorized for issue in connection with a Letter of Commendation and commendation ribbon. On September 21, 1960, the Secretary of the Navy changed the name of the award to the Navy Commendation Medal. On August 19, 1994, the Secretary of the Navy renamed the medal as the Navy and Marine Corps Commendation Medal. It is impossible that the approving officer could have signed an official document in 1957 indicating Mr. Swisher's entitlement to a personal decoration which did not exist in its present form until 1994.

Further review of Mr. Swisher's records reveals that he is not entitled to any service awards, including the Marine Corps Expeditionary Medal, for his service in the U.S. Marine Corps. Mr. Swisher's official military records failed to indicate any information that he served in Korea during the period when any awards were authorized. His

> records show that he was stationed at Camp Fuji and Yokosuka, Japan from March 4, 1955 to May 6, 1956.
>
> There is no information in his military record or his medical record to substantiate his entitlement to a Purple Heart medal. His medical records show that on February 10, 1957, he was involved in a private vehicle accident near Port Townsend, Washington.

Later on Friday, January 21, the court received Swisher's official military file – "a half-inch-thick stack of materials" – from the National Personnel Records Center in response to its subpoena. The official military file contained a copy of the Dowling letter. The government undoubtedly anticipated that the file would arrive on or about that day, and that when it arrived it would contain the Dowling letter that the government had presented to the court that morning. The presence of the Dowling letter in the file was entirely predictable, for it stated in its last paragraph: "[Mr. Swisher's] records will be returned to the National Personnel Records Center, and a copy of this letter will be filed in Mr. Swisher's official military records."

Swisher's official military file also contained a copy of Swisher's original Form DD-214. This Form DD-214 matched precisely the Form DD-214 that Swisher registered in the Idaho County Recorder's office in February 2001. This Form DD-214 showed that Swisher had never received any military awards.

Swisher's official file also contained the two documents that Keeley had sent to Dowling for evaluation. One of the documents was a copy of the "replacement DD-214" purportedly signed by Capt. W. J. Woodring, Jr. that Swisher had pulled out of his pocket on the witness stand. The other document was a letter purportedly written to Swisher by Woodring on October 16, 1957. That letter stated:

> I am pleased to inform you that your combat action, awards and citations have been verified. A copy of a replacement DD 214 transfer document, which more accurately reflects your military service, is attached to this correspondence. The original has been forwarded to the Commandant of the Marine Corps at Headquarters Marine Corps in Washington, D.C.
>
> . . .
>
> When you recover from surgery, both Major Morgan and I encourage you to enter a R.O.T.C. program at the college of your choice. Glad we were able to help.

As indicated above, the Dowling letter stated that "we have reason to believe" that both of these documents "are not authentic."

Outside the presence of the jury, the court stated – somewhat surprisingly in view of the contents of the file – that a "quick review of the file indicates that Mr. Swisher was, in fact, involved in top secret activities; and it appears that he was awarded the medals

that he claims that he was awarded. . . . [The documents] do not appear to be impeaching." The court told counsel that it would conduct a more thorough review of the file over the weekend.

When the trial reconvened on Monday, January 24, the court discussed Swisher's official military file with counsel off the record. Then, on the record and without the jury present, the court stated its conclusions. The court stated that the file had been sent to the court by the National Personnel Records Center in response to the court's subpoena; that the Dowling letter in the file matched the letter provided to the court by the prosecution on Friday; and that the Dowling letter concluded that the "replacement DD-214" and the "supporting letter" purportedly signed by Woodring were "not authentic." But the court stated that it found the file "very difficult to decipher." The court stated:

> It is not at all clear to me what the truth of the matter is; and I suspect it has something to do with the fact that we are dealing with events that occurred fifty years ago and that, at the time that they occurred, were involving top secret military activities.
>
> So I wanted you to look at it because, obviously, you have to make your own judgment as to what you think the significance of it is.

The court stated that "the problem the court had in reviewing the documents in camera is that the

documents we have, themselves, are neither self-authenticating nor self-explanatory."

The court concluded:

> And I do not want to turn this issue into a peripheral mini-trial under Rule 608(b) of the Rules of Evidence.
>
> . . .
>
> So the state of the record at this point before the jury is that the jury is not to consider Mr. Swisher's battlefield commendations, or lack thereof, although they can certainly assess his credibility with regard to the extensive cross-examination that was conducted by the defense and see how it jives with all of the other evidence in the case.

Defense counsel replied that, in light of the information now before the court, the defense deserved an opportunity to question Swisher further about his "replacement DD-214" and his military experience. Defense counsel reiterated that Swisher had worn a Purple Heart on the witness stand.

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The prosecutor reminded the court that during his direct examination of Swisher he had not attempted to elicit "for the truth of the matter that Swisher was, indeed, in combat." Instead, he said, the jury heard about "a conversation . . . between Mr. Swisher and Mr. Hinkson regarding Hinkson asking

him, 'Were you ever in combat?'" The prosecutor also addressed "what we call a Replica Purple Heart. It's not a real Purple Heart at all." The basis of the prosecutor's conclusion that the lapel pin Swisher wore on the witness stand was "not a real Purple Heart at all" is not clear from the record. The prosecutor maintained to the court that, in any event, whether Swisher was "entitled to wear a Replica Purple Heart or any other kind of little medal on his lapel" was a "collateral issue that arose only on cross-examination."

Defense counsel told the court that he was "concerned about when the Government got [the Dowling letter]," which the prosecutor had provided to the court on Friday morning, January 21. The prosecutor responded, "[W]e got it – I believe Agent Long got it the day before by going to the Veterans' Administration." The prosecutor added that the Dowling letter, standing alone, did not prove that Swisher's "replacement DD 214" was fraudulent. He said:

> What they would really have to prove, if this were to be resolved, is they would have to prove that the substitute DD-214 signed by Captain Woodring, in, I believe, October '57 – . . . that the signature of Captain Woodring was forged; and I would suggest that probably would resolve whether it's correct or not.
>
> How you would prove that something that was signed in 1957 – I doubt very much

> Mr. Woodring is still with us, but I don't know.

The court agreed that it "was not at all convinced yet" that "the document that Mr. Swisher pulled out of his pocket [was] false or not" because Swisher's military record was not "self-explanatory." The court stated, "I have no idea, if somebody is involved in secret military operations, whether or not their personnel file . . . would ever reflect those missions." The court stated that it needed to hear from "a records custodian from the National Personnel Records Center or someone else who is more familiar with military records and decorations than any of us."

The court ruled that the defense would be permitted to recall Swisher for further cross examination but would not be permitted to introduce into evidence any of the documents bearing on his military experience. That is, the court ruled that the defense would not be permitted to introduce the Tolbert letter, the Dowling letter, or anything else contained in Swisher's official military file that had been sent in response to the court's subpoena. The court stated:

> The documents which form the basis for the doubt cast on Swisher's military record and [his] entitlement to wear the Purple Heart are extrinsic evidence probative of a specific incident of untruthfulness.
>
> The court therefore holds that the admission of these documents is barred by Rule 608(b).

. . .

Furthermore, the court holds that admission of the actual documents of impeachment is barred under Rule 403.

First, the documents have not yet been officially authenticated; and this process could waste considerable time on tangential issues only indirectly related to the issues to be resolved at trial and, perhaps, submitted to the jury as early as tomorrow.

Second: The documents themselves are not entirely conclusive. They are certainly not self-authenticating. The Government would have to be allowed to introduce conflicting documents or testimony of military officers to explain them.

The proffered documents state, in summation, that Swisher's record does not indicate that he earned any service record or service medals during his military duty; however, other documents available to the court suggest that Swisher might, indeed, have earned such medals.

. . .

The defense may reference these documents during its cross-examination. . . .

In sum, the court finds that the questionability of Swisher's character for truthfulness may be amply demonstrated to the jury by re-opening cross-examination and by allowing the defense to reference the

> impeaching documents during the cross-examination.
>
> . . . .
>
> I will let the defense decide which way they want to go; either leave it alone or call him.

The next morning, Hinkson's counsel informed the court that, given his inability to introduce into evidence the military documents showing that Swisher had lied on the stand about receiving the Purple Heart and other decorations, he had decided not to recall Swisher.

The government made several references to Swisher's military experience during closing arguments to the jury. The prosecutor began by explaining the significance of Swisher's testimony:

> The judge will further instruct you that the fourth sort of circumstance that you can consider to be strongly corroborative of Mr. Hinkson's intent to solicit murder would be the fact that an accused believed or was aware that the person solicited had previously committed similar offenses.
>
> Mr. Swisher's testimony was powerful. He talked about how Mr. Hinkson understood that Mr. Swisher had been in the military and had killed a lot of people. He was very impressed by that.
>
> In fact, according to Mr. Swisher, Mr. Hinkson asked, "Have you killed somebody?"

> And when Mr. Swisher says, "Yes," Mr. Hinkson's response is not, "Wow, that must be terrible," but it is, "How many people have you killed?" He was very impressed by that.

The prosecutor stated that "[a]nother reason Mr. Hinkson liked Joe Swisher and they were friends is Mr. Swisher had been in the Marine Corps. Mr. Hinkson had served in the Navy. Joe Swisher told you they talked about their experiences in the Service." The prosecutor stated later, "Mr. Swisher, I suggest to you a reasonable juror could find, told the truth about the solicitation." At the end of the government's closing, the prosecutor stated that Hinkson "understood Mr. Swisher had a military record and that he had served in combat and killed people. It's the kind of person he thinks will do such a thing."

On January 27, 2005, after two days of deliberations, the jury returned a guilty verdict on the Swisher-related solicitation counts. It acquitted or hung on all other counts.

On March 3, 2005, just over a month later, defense counsel moved for a new trial under Federal Rule of Criminal Procedure 33. The motion relied on, *inter alia*, "newly discovered evidence" that Swisher had lied under oath on the witness stand and had produced a forged document in court. That evidence consisted of a newly obtained affidavit from Chief Warrant Officer W.E. Miller, the Marine Corps liaison to the National Personnel Records Center, and a newly obtained affidavit from now-retired Colonel

W.J. Woodring, Jr., the Marine Corps officer whose signature appeared on Swisher's original Form DD-214, on the purported "replacement DD-214," and on the purported "supporting letter" for the "replacement DD-214." These documents were precisely what the district court and the government had said were needed to prove that Swisher had lied on the stand.

Chief Warrant Officer Miller stated, in an affidavit dated February 24, 2005, "As part of my duties . . . I have access to the official United States military records of former members of the USMC which are deposited in the N[ational] P[ersonnel] R[ecords] C[enter] and, among my other responsibilities, I evaluate the authenticity of information, records and documents affecting individual Defense Department transfer documents including DD Forms 214."

Miller concluded that Swisher had never been awarded a Purple Heart. He wrote that his reasons included the following:

> A. Swisher's medical records show that he did not sustain any combat wounds, rather he was involved in a private motor vehicle accident near Port Townsend. Washington on 10 February 1957 and was treated at the hospital at Bremerton, Washington. . . .
>
> B. The DD Form 214 signed by Swisher on 3 August 1957 . . . which is a part of his official U.S. military record contains a specification that he was not entitled to VA benefits[.]

C. Swisher's official U.S. military record indicates that he was subject to an Article 115 disciplinary action resulting in demotion from Corporal to Private First Class on 28 Feb. 56 which involved disobedience to military law during his active tour of duty[.]

D. Swisher's official U.S. military record shows that rather than being assigned to missions in post-War Korea (as claimed by Swisher) he was stationed at Camp Fuji and Yokosuka, Japan from 4 March to 6 May 1956 with no supporting documentation or information to indicate that he participated in any classified Marine Corps expeditionary operation that performed incursions into Korea during his tour of active duty. . . .

E. Swisher asserts that the expeditionary missions he was involved with in Korea were classified as "Top Secret" operations. The U.S. Marine Corps did not perform any classified operations or "Top Secret" operations during Swisher's tour of duty.

Miller also concluded that the "replacement DD-214" that Swisher had presented in court was not an "authentic document." (Miller referred to this document as "Exhibit C.") In addition to the factors enumerated in support of his conclusion that Swisher was not entitled to a Purple Heart, Miller wrote:

A. Military Rules and Procedures require that a DD Form 214 can only be issued and retyped at the Headquarters of the USMC and signed by a designee of the Commandant of the Marine Corps who offices at Headquarters. Capt. Woodring never held such designation.

B. Exhibit C, in box 32 provides: "*[t]his document replaces the previously issued transfer document of 8-3-57.*" There are no additional records in Swisher's file that support the claim that Swisher's original DD Form 214 was replaced;

C. Exhibit C, box 32, provides: "*[c]hanges and additions have been verified by Command.*" Changes or additions in Swisher's original DD Form 214 if truly "*verified by Command*" would have resulted in verification documents becoming a part of Swisher's official U.S. military record. . . .

. . .

G. Military policy and procedure which has been in effect since before the time of Swisher's transfer from active duty to the USMC Reserves on 3 Aug. 57 would have directed the issuance of a DD Form 215 first, before any replacement version of Swisher's original DD Form 214 would have been issued. . . .

H. There is no record of a DD Form 215 ever having been issued for Swisher.

(Emphasis and brackets in original.)

Now-retired (and, to the government's suprise [sic], still living) Marine Corps Colonel W.J. Woodring, Jr., in an affidavit dated February 27, 2005, stated:

> 2. I spent 35 years 6 months in the United States Marine Corps. I was a Captain in the Marine Corps in 1957. I am now retired and I reside in Southern California.
>
> 3. I have reviewed Exhibit A attached which purports to be a copy of a letter addressed to Pfc Elven Joe Swisher (Swisher) dated 16 Oct 1957. I did not write or cause Exhibit A to be written. Below the words Semper Fidelis, there is handwriting that purports to be my signature. I did not sign Exhibit A. What looks like my signature on Exhibit A is actually the image of my signature that has somehow been superimposed upon the letter. Exhibit A is a forgery.
>
> 4. I have reviewed Exhibit B attached which purports to be a copy of a "Replacement DD 214" for Swisher. In box 34b there is handwriting that purports to be my signature. I did not sign Exhibit B. What looks like my signature on Exhibit B is actually the image of my signature that has somehow been superimposed upon the letter. Exhibit B is a forgery.

On April 22, 2005, the court denied Hinkson's motion for a new trial. Applying the criteria set forth in *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003), the court gave several reasons for declining to grant a new trial on the basis of Hinkson's newly discovered evidence. First, the court concluded that Hinkson had not been diligent in seeking the evidence he now submitted to the court. Second, the court concluded that the evidence was not "newly discovered" because "[t]he substance of both proffered documents is not new and is generally cumulative of previously available information." Finally, "[m]ost importantly," the court concluded that "the proffered 'new' evidence is not material to the issue at trial, nor would a new trial probably result in an acquittal, because the evidence is inadmissible." The court explained that it had "previously held on the record at trial . . . and now reiterates, admission of the proffered documents and testimony is still prohibited by Fed. R. Evid. 608(b), which bars introducing extrinsic evidence of the witness's past conduct."

Hinkson was sentenced on June 3, 2005, for his solicitation convictions as well as for his tax evasion and currency structuring convictions. He received a total of 43 years in prison: ten years on the tax and structuring charges, ten years on each of the three solicitation charges, and an additional three years for having made the solicitations while on pretrial release in the tax case.

II. Subsequent Indictment and Conviction of Swisher

On July 30, 2007, the government indicted Swisher for knowingly wearing military decorations to which he was not entitled, including the Purple Heart, in violation of 18 U.S.C. § 704(a); for willfully and knowingly making false representations about his military service in order to obtain benefits to which he was not entitled, in violation of 18 U.S.C. § 1001(a)(2); and for presenting false testimony and a "forged form DD-214" in order to obtain benefits to which he was not entitled, in violation of 18 U.S.C. §§ 641 and 642. As the date of the indictment makes clear, the government indicted Swisher more than two years after the district court ruled on Hinkson's motion for a new trial. On April 11, 2008, Swisher was convicted on all three counts of the indictment. Because Swisher's indictment and conviction did not occur until after the district court ruled on Hinkson's motion for a new trial, the district court obviously could not have considered them in reaching its decision.

III. Appeal

On appeal to this court, Hinkson challenges the denial of his motion for a new trial on three grounds. First, Hinkson argues that the district court erred in precluding him from introducing into evidence the military documents that would have shown that Swisher lied about his Purple Heart, about his other decorations, and about his forged "replacement

DD-214." Second, Hinkson argues that the prosecution engaged in misconduct by referring to Swisher's military background during its closing argument after it was clearly on notice of the contents of Swisher's official military file. Third, Hinkson argues that he is entitled to a new trial based on the new evidence presented in his post-trial motion under Rule 33. I would reach only the first and third arguments. I agree with both of those arguments and would reverse the district court based on either of them.

A. Refusal to Admit Impeaching Military Documents into Evidence

We review for abuse of discretion a district court's evidentiary rulings, including decisions to admit or exclude impeachment evidence. *United States v. Tran*, 568 F.3d 1156, 1162 (9th Cir. 2009); *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002). We must then apply the harmless error standard. We will reverse an evidentiary ruling for abuse of discretion "only if such nonconstitutional error more likely than not affected the verdict." *United States v. Edwards*, 235 F.3d 1173, 1178-79 (9th Cir. 2000); *see also* Fed. R. Crim. P. 52(a) ("Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

Hinkson sought to introduce the Tolbert letter, the Dowling letter, and the rest of Swisher's official military file in order to show that Swisher lied about receiving the Purple Heart and his other claimed

military decorations, and to show that he had forged his so-called "replacement DD-214" that he had brandished before the jury. The district court excluded this evidence based on Federal Rules of Evidence 608(b) and 403.

Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The district court deemed the documents bearing on Swisher's military experience "extrinsic evidence probative of a specific incident of untruthfulness" and therefore inadmissible under Rule 608(b).

The district court erred as a matter of law in holding that the Tolbert letter, the Dowling letter, and the other documents in Swisher's file could be excluded under Rule 608(b). The 2003 Advisory Committee Notes to Rule 608 make clear that "the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to

attack or support the witness' character for truthfulness." Fed. R. Evid. 608(b), advisory comm. notes (2003). Hinkson did not seek to introduce those documents for the sole "purpose of attacking . . . the witness' character for truthfulness." Rather, Hinkson sought to introduce the documents for the specific purpose of contradicting in-court testimony by Swisher. Such evidence is governed by Rule 607, which "permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999).

Swisher took the witness stand wearing a Purple Heart lapel pin, thereby affirmatively stating that he had been wounded in combat while serving in the United States armed forces. Rule 801(a) provides, "A 'statement' is . . . nonverbal conduct of a person, if it is intended by the person as an assertion." Recall that in his opening statement to the jury three days before, the prosecutor had described Swisher as "a Combat Veteran from Korea during the Korean conflict [who] was not adverse to . . . violent, dangerous activity." Particularly given the prosecutor's statement, the jury could hardly avoid understanding Swisher's wearing of the Purple Heart as "nonverbal conduct . . . intended . . . as an assertion" that he had been wounded in military combat. The documents Hinkson sought to introduce would have directly contradicted that statement, and would have shown Swisher to be a liar.

The district court also erred by refusing to allow Hinkson to introduce this extrinsic evidence to impeach Swisher based on Rule 403. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The district court abused its discretion by concluding that it would be unduly time-consuming and confusing to the jury to admit the official military documents showing that Swisher lied about receiving a Purple Heart, and that, when challenged, he lied about having a so-called "replacement DD-214." Although some parts of Swisher's military record may have been difficult for a lay jury to understand, other parts were easy to comprehend. For example, the Dowling letter was clearly written and unambiguous. It stated simply and directly that Swisher had not been in combat and had not been awarded any medals. Other documents in Swisher's official military file – which had been sent to the court pursuant to its subpoena and whose authenticity was not in doubt – unambiguously showed that Swisher's "replacement DD-214" was a forgery. Given Swisher's crucial role in the government's case against Hinkson, the time it would have taken to admit this evidence could hardly have outweighed its probative value.

The district court's refusal to allow Hinkson to admit this documentary evidence was not a harmless error. Swisher was the government's principal witness on the only counts on which Hinkson was convicted. The jury would have formed a significantly different impression of Swisher's credibility if Hinkson had been permitted to introduce evidence that Swisher lied about his military record on the stand. For the reasons I describe in detail below, this would have called into serious doubt all of Swisher's testimony, including his statements describing his interactions with Hinkson.

B. New Evidence Produced in Support of Motion for New Trial

Hinkson's motion for a new trial asserted that the Miller and Woodring affidavits, newly obtained after trial, proved conclusively that Swisher had presented false testimony and had presented a forged document during trial. The government no longer disputes that Swisher lied about his military experience and presented a forged "replacement DD-214." It contends, however, that the newly obtained Miller and Woodring affidavits do not warrant a new trial.

We review for abuse of discretion a district court's denial of a motion for a new trial based upon newly discovered evidence. *See, e.g., United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995). A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous

findings of fact, or when we are left with "a definite and firm conviction that the district court committed a clear error of judgment." *Delay v. Gordon,* 475 F.3d 1039, 1043 (9th Cir. 2007) (internal quotation marks omitted).

Under *United States v. Harrington,* 410 F.3d 598 (9th Cir. 2005), a criminal defendant must satisfy a five-part test in order to prevail on a motion for a new trial:

> "(1) [T]he evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal."

Id. at 601 (quoting *United States v. Kulczyk,* 931 F.2d 542, 548 (9th Cir. 1991)). The district court applied this *Harrington* test, citing *Waggoner,* 339 F.3d at 919.

What we today call the *Harrington* test is sometimes referred to as the "*Berry* rule," named for the nineteenth-century case from which it derives. *See* 3 Charles Alan Wright et al., *Federal Practice and Procedure* § 557, at 541 (3d ed. 2004) (citing *Berry v. State,* 10 Ga. 511, 527 (1851)). Although we ordinarily state the test as comprising five requirements, we have recognized that requirements (3), (4), and (5) are

duplicative. That is, newly discovered evidence is "material" when the result of the newly discovered evidence is that "a new trial would probably result in acquittal," a condition that is not usually met when the newly discovered evidence is "cumulative [ ] or merely impeaching." *See, e.g., United States v. Krasny,* 607 F.2d 840, 845 n. 3 (9th Cir. 1979) (noting that the materiality and probability requirements "are really two means of measuring the same thing"); *United States v. Davila,* 428 F.2d 465, 466 (9th Cir. 1970) (per curiam) (noting that newly discovered impeachment evidence supports a new trial if "it is likely that the jury would have reached a different result" in light of the evidence); *see also* Wright et al., *supra,* § 557, at 552.

The character of the defendant's newly discovered evidence determines how strictly we apply the *Harrington* probability requirement. Our usual rule is that newly discovered evidence does not entitle a defendant to a new trial unless the evidence indicates that it is more probable than not that the new trial will result in acquittal. This rule applies to most newly discovered evidence, including newly discovered evidence tending to show that evidence presented at the defendant's trial was false. *See Krasny,* 607 F.2d at 842.[1]

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[1] We have sometimes applied a less demanding standard for granting a new trial where it is known conclusively at the time of the new trial motion that the evidence presented at trial was false. *See Hall v. Dir. of Corr.,* 343 F.3d 976 (9th Cir. 2003);

(Continued on following page)

I would conclude that Hinkson has satisfied all five parts of the *Harrington* test. To my surprise, the majority concludes that Hinkson has satisfied *none* of them.

1. Newly Discovered Evidence

Under the first part of the *Harrington* test, we must determine whether the evidence presented in support of the motion for a new trial is "newly discovered." Hinkson's new trial motion relied on two new pieces of evidence: (1) the affidavit from Chief Warrant Officer Miller, the Marine Corps liaison to the National Personnel Records Center; and (2) the affidavit from Colonel Woodring, the officer whose purported signature appeared on Swisher's "replacement DD-214" and "supporting letter." It is undisputed that neither piece of evidence was known to, or was in the possession of, the defense until after Hinkson's trial had concluded.

The majority concedes that both the Miller and Woodring affidavits are "newly written" evidence, but it contends that the affidavits "did not provide any new *information* that was not already considered and rejected from evidentiary admission by the court." Maj. Op. at 14981. In other words, the majority

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Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002); *United States v. Young*, 17 F.3d 1201 (9th Cir. 1994). Because I would hold that Swisher is entitled to a new trial under the *Harrington* test, it is unnecessary to apply this test.

concludes that the evidence contained in the documents is merely cumulative of evidence that was already known during trial. That argument is best addressed to the third *Harrington* requirement, and I address that argument in detail below. I respond only briefly here.

The majority's conclusion would be more persuasive if the district court had not indicated clearly during trial that, in its view, the evidence then before it was insufficient to show that Swisher had lied about his military record. After reading the half-inch-thick file received on January 21 from the National Personnel Records Center, which included the Dowling letter, the district court stated, "It is not at all clear to me what the truth of the matter is." The court indicated that the file was "very difficult to decipher" and not "self-explanatory." The court stated that it could not resolve its uncertainty without "hearing from" a military "records custodian" or similar person. The prosecutor added that what was needed in order to show the falsity of the "replacement DD-214" was an affidavit from Colonel Woodring stating that his signature had been forged.

As I will discuss in more detail below, the newly provided Miller and Woodring affidavits were precisely the evidence that the district court and the prosecutor on January 21 had described as fatally lacking. If the district court had not explicitly stated that evidence of the sort provided by the Miller and Woodring affidavits was needed to "decipher" Swisher's file and to determine the truth, the majority's

conclusion that this evidence is merely cumulative might be understandable. But the district court's explicit statement that it needed precisely this evidence makes it is impossible to conclude that the "substance" of the Miller and Woodring affidavits was not new.

2. Diligence

Under the second part of the *Harrington* test, we ask whether the failure to discover the evidence sooner resulted from a "lack of diligence on the defendant's part." *See Kulczyk*, 931 F.2d at 548. A court cannot conclude that a defendant lacks diligence merely because a defense team with unlimited time and resources might have managed to discover the evidence sooner. Instead, a court must ask whether it was unreasonable for the defense to have failed to discover the evidence more promptly. "All that is required is ordinary diligence, not the highest degree of diligence." 3 Wright et al., *supra*, § 557, at 559-60.

The district court concluded that Hinkson had not been sufficiently diligent in discovering the new evidence. It wrote, "[T]he Court finds that Defendant is unable to establish that the failure to discover this evidence was not due to his counsel's lack of diligence. . . . [T]he Court finds that defense counsel had ample time to investigate Swisher's record prior to trial, but was not diligent in pursuing the issue."

In support of its conclusion that Hinkson had not been diligent, the district court pointed out that

Swisher had testified to receiving "battlefield injuries" from his military service during an October 11, 2004, deposition in a civil suit involving Swisher and Hinkson. Hinkson was represented in that suit by Wesley Hoyt, one of the two attorneys representing him in his criminal case. In further support of its conclusion, the district court pointed out that Swisher had discussed his purported war injuries even before the deposition, during his grand jury testimony on April 16, 2002, and February 10, 2004.

Swisher's deposition in the civil case took place just three months before the start of Hinkson's criminal trial. That was the first time Hinkson was put on notice of Swisher's claimed "battlefield injuries."

It is true, as the district court wrote, that Swisher gave grand jury testimony in 2002 and early 2004. But this meant only that the *government* knew about Swisher's grand jury testimony, and thus the *government* was put on notice in 2002 and 2004 of his claimed "battlefield injuries." As the district court knew or should have known, precisely because it was grand jury testimony, that testimony was kept secret from Hinkson. The government finally turned Swisher's grand jury testimony over to Hinkson pursuant to the Jencks Act on January 4, 2005, only one week before trial.

Thus, the first time Hinkson was put on notice of Swisher's claimed battlefield injuries was on October 11, 2004. On January 14, 2005, when Hinkson's counsel sought to reopen his cross examination of

Swisher in order to question him about the Tolbert letter, counsel stated to the court, "For quite sometime [sic], we have been trying to dig into his military history because we don't believe it's accurate." Then, after Swisher pulled the "replacement DD-214" out of his pocket, Hinkson's counsel stated at the sidebar that the defense had "been trying to get Mr. Swisher's military records *for about ninety days;* and we have very little control over when that happens." (Emphasis added.) January 14 is ninety-five days after October 11.

Thus, we know from the uncontradicted trial transcript that Hinkson's counsel tried to obtain Swisher's military record immediately after his October 11 deposition. We also know that government authorities, over whom defense counsel had "very little control," were slow to respond. The government did not provide anything to Hinkson until it provided the Tolbert letter on the very day of Swisher's testimony. The government can hardly claim that Hinkson was not diligent when his counsel sought the information immediately after Swisher's October 11 deposition, and it was the *government* that took ninety days to respond.

In my view, Hinkson's counsel were diligent in looking for evidence that could be used to impeach Swisher. Indeed, they were successful in finding such evidence. As a result of their efforts, defense counsel received the Tolbert letter from the National Personnel Records Center while Swisher was still on the stand. The letter recounted that Swisher did not

enter active duty until 1954. It stated that "Swisher's Marine Corps record has been carefully examined by the Military Awards Branch . . . , and that office has stated that his record fails to show that he was ever recommended for, or awarded any personal decorations."

Hinkson's counsel reasonably viewed the Tolbert letter as exactly the sort of impeaching evidence it had been seeking. Counsel hoped that Swisher, when confronted with the letter, would be forced to admit that he was not the decorated combat veteran he purported to be. Counsel could hardly have anticipated that Swisher, after being shown the letter, would pull from his pocket a forged document purporting to provide a superseding account of his military service. Until that moment, there was little reason for the defense to suspect the existence of Swisher's "replacement DD-214," let alone to suspect that the document was a forgery.

After learning of the "replacement DD-214" on Friday, January 14, the defense was quick to investigate its authenticity. On Wednesday, January 19, following a long holiday weekend, defense counsel informed the court that they had learned that Swisher had recorded two different DD-214 forms with Idaho County, and that the earlier-recorded DD-214 was "devoid of any . . . honors and medals." Counsel also stated that they had spoken to staff at the National Personnel Records Center who stated that the Center stood by the conclusions of the Tolbert letter but would not release additional documents

about Swisher without a subpoena from a judge. The court agreed to subpoena Swisher's military file, which arrived two days later, on Friday, January 21.

The court kept Swisher's military file to review over the weekend, and then disclosed it to counsel on Monday, January 24, the last full day of testimony before closing arguments. The court ruled that it would allow the defense to recall Swisher for further cross examination, but would not allow the defense to introduce into evidence any of the military documents obtained. The court stated further that it did not want to conduct a mini-trial during which the government would put experts on the stand to explain the documents. Once Hinkson's trial concluded, the defense was diligent in obtaining the evidence from Woodring and Miller. It filed its motion for a new trial just over one month after the conclusion of trial. *See* Fed. R. Crim. P. 33(b)(1) (providing that motions for a new trial "grounded on newly discovered evidence must be filed within 3 *years* after the verdict" (emphasis added)).

The government had its own duty to investigate Swisher's military record, having been alerted to "the real possibility of false testimony." *Commonwealth of N. Marina Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001). Because the government had participated in the grand jury proceedings, it knew long before Hinkson's counsel that Swisher had given potentially false testimony about his military experience. Swisher's first grand jury testimony was in April 2002. This was two years and three months before Swisher's

deposition, and two years and sixth months before Hinkson's trial. During this period, if it had wished to do so, the government could easily have obtained Swisher's official military file to determine whether its star witness was telling the truth. But so far as the record shows, the government made no effort to do so.

The government now argues that Hinkson was not diligent in investigating Swisher's military record. But for two and a half years, it was the *government* that made virtually no effort to investigate the trustworthiness of its star witness. Further, it was the *government* that took ninety days to respond to Hinkson's request immediately after Swisher's October 11 deposition for information about his military record. Yet the government now has the nerve to argue that it was *Hinkson* who was not diligent. It is almost incomprehensible to me that the government would make that argument. It is entirely incomprehensible that the majority would accept it.

3. Material to the Issues at Trial

The third part of the *Harrington* test requires that the newly discovered evidence be "material to the issues at trial." In the context of a new trial motion under *Harrington*, materiality has a special meaning. Materiality under *Harrington* does not require that the evidence in question would have been material at the original trial. Rather, materiality under *Harrington* requires that the evidence in

question will materially alter the result on *retrial*. In many cases, there will be little or no practical difference. *See, e.g., United States v. George*, 420 F.3d 991, 1001 (9th Cir. 2005) (analyzing materiality in terms of the first trial). But the *Harrington* test is clearly framed in terms of what will happen on retrial rather than what happened at the original trial. *See Harrington*, 410 F.3d at 601 ("[T]he evidence must indicate that a new trial would probably result in acquittal."); *see also Krasny*, 607 F.2d at 844 ("Yet, we have always required a showing that the new evidence would 'probably' result in an acquittal upon a new trial."); *id.* at 845 n. 3 (explaining that materiality and probability "are really two means of measuring the same thing"). As I discuss below, in addressing *Harrington*'s fifth requirement, I conclude that the newly discovered evidence of Swisher's fabrications makes it probable that a new trial will result in acquittal. Thus, I also conclude that the new evidence is material under *Harrington*.

The majority relies on evidentiary rulings made by the district court. It notes that the district court held that documents showing that Swisher lied about his military record were inadmissible under Federal Rule of Evidence 608(b). The majority further notes that the district court excluded the evidence under Rule 403. As discussed above, the district court's evidentiary ruling under Rule 608(b) was wrong as a matter of law, and its ruling under Rule 403 was an abuse of discretion. The majority does not merely hold (erroneously) that the evidence was correctly

excluded by the district court. It goes further, suggesting that because the district court properly excluded the impeaching documents from evidence under Rules 608(b) and 403, these documents could have no material effect on retrial. Even if this were true, this is irrelevant under *Harrington*. The materiality test under *Harrington* is not whether the newly discovered evidence – the Miller and Woodring affidavits – would have been admissible during Hinkson's first trial. The test is whether the newly discovered evidence would probably result in acquittal *on retrial*.

As I discuss in detail in part five of the *Harrington* test, I conclude that the Miller and Woodring affidavits would probably result in acquittal on retrial. The affidavits would not have to be admitted into evidence to have this effect. The government has now conceded that Swisher lied about his military record, that he did not engage in combat, that he did not earn the Purple Heart he wore on the witness stand, that he did not earn any of the other military records to which he claimed he was entitled, and that he brandished a forged "replacement DD-214" in front of the jury. Both sides now know the truth. If Swisher takes the stand and is asked about his military record, and if he is asked whether he lied under oath about that record at the first trial, the truth will necessarily come out. There are two alternatives. If Swisher tells the truth, the truth will come out through his testimony. If Swisher lies, the government will have a professional obligation to correct

the record and to disown the testimony of its star witness.

4. Neither Cumulative nor Merely Impeaching

The fourth part of the *Harrington* test requires that the new evidence be "neither cumulative nor merely impeaching."

a. Cumulative

The district court concluded that "[t]he substance of both proffered documents is not new and is generally cumulative of previously available information." The "previously available information" to which the court referred consists of the documents that came to light at three different points during the trial: first, the Tolbert letter used by defense counsel to cross examine Swisher on January 14; second, the Dowling letter, which the prosecution gave to the court on the morning of January 21 and which the court also received later that day as part of Swisher's official military file; and third, the remainder of Swisher's official military file, which the court received on the afternoon of January 21.

During trial, the district court concluded that these documents established neither that Swisher's testimony was false nor that the "replacement DD-214" was fraudulent. On Monday, January 24, after reviewing Swisher's military file, including the Dowling letter, over the weekend, the court told

counsel outside the presence of the jury that it found the file "very difficult to decipher," and stated that "the truth of the matter" was "not at all clear." The court told counsel that the documents in the file were "neither self-authenticating nor self-explanatory" and did "not conclusively decide the issue." The court concluded that it was "not at all convinced" that it had enough evidence to "resolve the question of whether or not the document that Mr. Swisher pulled out of his pocket is false or not."

The district court stated that it remained uncertain about the truthfulness of Swisher's testimony and the authenticity of the "replacement DD-214," despite the fact that Swisher's military file was a government record that the court itself had subpoenaed, and despite the fact that the file contained the Dowling letter. The Dowling letter, written by an officer in the Headquarters of the U.S. Marine Corps, stated in plain language that Swisher had not earned any personal military commendations and that the "replacement DD-214" was a forgery. Another fact-finder may have found this evidence sufficient to show that Swisher was a forger and a liar. But the district court was explicit in saying that it found that the evidence then before it was inconclusive.

The district court stated that "the only way" to resolve the uncertainty surrounding the "silent file" would be to hear from "a records custodian from the National Personnel Records Center or someone who is more familiar with military records and decorations

than any of us." The prosecutor agreed with the court's assessment and added:

> What [the defense] would really have to prove, if this were to be resolved, is that . . . the substitute DD-214 signed by Captain Woodring, in, I believe, October '57 – that . . . the signature of Captain Woodring was forged; and I would suggest that probably would resolve whether it's correct or not.
>
> How you would prove that something that was signed in 1957 – I doubt very much Mr. Woodring is still with us, but I don't know.

Precisely the additional evidence the court said was lacking was supplied by Hinkson in his motion for a new trial in the form of an affidavit from Chief Warrant Officer Miller. Miller is the U.S. Marine Corps Liaison Officer to the National Personnel Records Center. His job is to "evaluate the authenticity of information, records and documents affecting individual Defense Department transfer documents including DD Forms 214." Miller concluded, after a thorough investigation, that the replacement DD-214 was a forgery and that Swisher had not earned a Purple Heart or any other personal commendation.

Similarly, precisely the additional evidence the prosecutor said was lacking was supplied in the form of an affidavit from the now-retired Colonel Woodring. As it turned out, Colonel Woodring is (to use the prosecutor's words) "still with us." Colonel Woodring stated unequivocally in his affidavit that his

signatures on both the purported 1957 letter to Swisher and the replacement DD-214 were forgeries.

In sum, the court stated at trial that the evidence before it was insufficient to allow it to determine the truth or falsity of Swisher's evidence. Defense counsel then presented to the court, in support of the motion for a new trial, precisely the additional evidence the court and the prosecutor said was needed to resolve the uncertainty. In this circumstance, this new evidence cannot possibly be considered cumulative.

The majority concludes that the Miller and Woodring affidavits are cumulative because "Hinkson's attorney had already proffered evidence that such 'Replacement DD-214' form was a forgery, in the form of the Tolbert and Dowling letters." Maj. Op. at 14983-84. The majority would be on firmer ground in so concluding if the district court had agreed with this statement. However, the district court was very clear in saying precisely the opposite of what the majority now says. As I have just explained, the district court concluded that Swisher's entire personnel file, including the Tolbert and Dowling letters, was insufficient to "establish that the replacement DD-214 was a forgery and that Swisher had lied about receiving military awards." Given the district court's view of the evidence then available, it is impossible to conclude that the Miller and Woodring affidavits are cumulative.

b. Merely Impeaching

Impeaching evidence may properly support a motion for a new trial under Rule 33. Indeed, we have expressly rejected the proposition that "impeachment evidence . . . is *never* sufficient to warrant a new trial under Fed. R. Crim. P. 33." *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992) (emphasis in original); *see also United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), *as amended* (concluding that new evidence impeaching the government's central witness was sufficiently powerful to require a new trial); *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991) (explaining that the prohibition on using impeachment evidence to secure a new trial should not be "taken at face value"); *Balestreri v. United States*, 224 F.2d 915, 917 (9th Cir. 1955) ("To deny in every case a motion for a new trial on the ground of newly discovered evidence for the sole reason that the evidence was 'merely impeachment' might often lead to injustice.").

We recognized in *Davis* that enforcing a per se prohibition on impeachment evidence as the basis for a new trial would be inconsistent with the spirit of Rule 33, which "permits the granting of a new trial motion 'if required in the interest of justice.'" *Davis*, 960 F.2d at 825. A per se prohibition would also be inconsistent with our longstanding refusal to draw a "categorical distinction between types of evidence." *Taglia*, 922 F.2d at 415; *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (refusing to distinguish between exculpatory and impeachment

evidence in the *Brady* context); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (refusing to distinguish between exculpatory and impeachment evidence in cases involving prosecutorial misconduct). Accordingly, we recognized in *Davis* that sometimes,

> newly-discovered impeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness' testimony totally incredible. In such a case, if the witness' testimony were uncorroborated and provided the only evidence of an essential element of the government's case, the impeachment evidence would be 'material' under [the *Harrington* test].

960 F.2d at 825; *see also Taglia*, 922 F.2d at 415 (holding that a new trial would be warranted under Rule 33 if it were discovered after trial that the government's star witness was "utterly unworthy of being believed because he had lied consistently in a string of previous cases"); 3 Wright et al., *supra*, § 557, at 560, 563 (noting that impeachment evidence is usually "not sufficient to justify a new trial," but that this is not an "invariable rule," and "in flagrant cases it may suffice").

In denying Hinkson's motion for a new trial, the district court wrote that "the proffered evidence [*i.e.*, the Miller and Woodring affidavits] is impeachment evidence and so is not a valid basis for a new trial." It is apparent from this statement that the district court believed mistakenly that, as a matter of law, impeachment evidence may never provide the basis

for a new trial. As just discussed, our cases do not so hold.

The majority concludes that the Miller and Woodring affidavits are impeaching and therefore cannot satisfy the fourth requirement of *Harrington*. It writes, "[E]videntiary admission of the extrinsic Miller and Woodring affidavits would serve no purpose other than to impeach Swisher's testimony as to his military record rather than his testimony as to Hinkson's solicitations." Maj. Op. at 14984. The majority mistakes the nature of the Miller and Woodring affidavits. They are powerful enough to permit a jury to conclude that Swisher's testimony inculpating Hinkson – the only uncorroborated testimony implicating Hinkson on the three counts for which the jury convicted him – was "totally incredible."

5. Probability of Acquittal on Retrial

The fifth *Harrington* requirement is that "the new evidence must indicate that a new trial probably would result in acquittal." I conclude that this new evidence would probably result in acquittal at retrial. I so conclude after comparing the evidence presented at trial on the three solicitation counts on which Hinkson was acquitted, and the three counts on which he was convicted.

I apologize for the length of the discussion that follows, but it is unavoidable. A judge who is asked to decide whether "a new trial probably would result in acquittal" necessarily must examine carefully the

evidence that was presented in the first trial, and, as a corollary, the evidence that is likely to be presented in the second trial. A judge ruling on a new trial motion may choose not to describe that evidence in detail, but he or she must necessarily consider it. Given the nature and importance of this case, I describe it in detail so that the reader may understand the basis for my conclusion.

Three solicitations to murder were charged in Counts 1 through 3 of the indictment. In these counts, the government charged that Hinkson had solicited James Harding "in or about January 2003" to murder Cook (Count 1), Hines (Count 2), and Lodge (Count 3). The jury acquitted Hinkson on all three of these counts.

Three more solicitations were charged in Counts 4 through 6. In these counts, the government charged that Hinkson had solicited James Harding "on or about March 17, 2003" to murder Cook (Count 4), Hines (Count 5), and Lodge (Count 6). The jury deadlocked on these three counts.

Three more solicitations were charged in Counts 7 through 9. In these counts, the government charged that Hinkson had solicited Swisher "between about December 2002 and February 2003" to murder Cook (Count 7), Hines (Count 8), and Lodge (Count 9). The jury returned a verdict of guilty on these counts.

Finally, two threats to commit murder were charged in Counts 10 and 11. In these counts, the government charged that Hinkson made statements

to Anne Bates in which he threatened to murder the children of Cook (Count 10) and the children of Hines (Count 11). The jury acquitted Hinkson on these counts.

The issue at trial was not whether Hinkson asked Harding and Swisher to kill Cook, Hines, and Lodge. The evidence was persuasive that he had done so. The issue was whether Hinkson had been serious in his requests. That is, the issue was whether he had an actual "intent" that Cook, Hines, and Lodge be killed, which was required under 18 U.S.C. § 373(a). Only if Hinkson was serious in soliciting the murder of Cook, Hines, and Lodge – that is, only if he had an actual intent that they be killed – did he commit a criminal offense.

The jury acquitted Hinkson outright on three of the nine counts charging solicitation in violation of § 373(a). On these three counts, the jury concluded that the government had not shown that Hinkson had been serious in soliciting murder on that occasion. The jury could not make up its mind on three more of the counts, unable to conclude unanimously that Hinkson had been serious in soliciting murder on that occasion. The jury was able to conclude unanimously only on three counts – Counts 7-9, the counts involving Swisher – that Hinkson had been serious in soliciting murder. To assess the likelihood of an acquittal on retrial on the three Swisher-related counts (Counts 7-9), I compare the evidence on the three Harding-related counts (Counts 1-3) on which Hinkson was granted an outright acquittal.

More than half of the trial testimony provided background evidence for all of the counts charged in the indictment. This background evidence showed that Hinkson owned and operated a lucrative business called WaterOz in Grangeville, a small town in Idaho. WaterOz bottled water into which had been dissolved, by a secret process supposedly invented by Hinkson, very small particles of minerals such as gold and platinum. According to Hinkson, the water has marvelous medicinal properties. Hinkson advertised and sold his magic water over the Internet.

Hinkson did not pay federal income tax, on the asserted ground that he was not legally obligated to do so. (In a separate appeal, our three-judge panel affirmed Hinkson's criminal conviction on his tax and currency structuring offenses.) Hinkson was unstable and paranoid. He was continually worried that people, including government officials and his own employees, were trying to take WaterOz from him. After Cook and Hines participated in an early-morning raid of his home in November 2002, Hinkson repeatedly claimed that they had tried to murder him. Hinkson also repeatedly claimed that an attorney named Dennis Albers, who previously had represented a plaintiff in a successful suit against him, was trying to murder him.

Hinkson developed grudges easily and held them tenaciously. He had a special dislike for employees of the federal government. Sometimes his talk was somewhat comical. For example, he talked to James Harding about a "fed-a-pult" and a "fed-guard." According

to Harding, a "fed-a-pult" was a device to catapult federal agents into a canyon or into an oncoming train. A "fed-guard" was something to put "on the front of your car like a cattle guard." Sometimes his talk was not comical at all. For example, the evidence at trial showed that Hinkson asked multiple people, on multiple occasions, to kill Cook, Hines, and Lodge, and that Hinkson repeatedly said he wanted to torture and kill people, including Cook's and Hines's children.

a. Evidence Supporting Counts 1-3

Counts 1 through 3 charged that in January 2003 Hinkson solicited James Harding to kill Cook, Hines, and Lodge. As noted above, the jury acquitted Hinkson on these counts.

The evidence supporting Counts 1 through 3 was as follows. In November or December 2002, Harding and Anne Bates met Hinkson at a "health forum" in Southern California. At that time, Harding was a restaurant manager in Southern California. Previously Harding had been a bodyguard and had worked "in the entertainment field." He had most recently "hosted" radio shows on "the paranormal"; before that his radio work had been "comedy shows, morning shows, afternoon drive, entertainment." His last radio work was three years before he testified.

After the "health forum," Hinkson, Harding, Bates, and several others went out to eat. During the meal, Hinkson offered Bates a job at WaterOz.

Harding and Bates drove to Grangeville at the beginning of January 2003 and stayed at Hinkson's house.

On the second night of Harding and Bates's stay, Harding was sitting at the kitchen table. Bates was nearby. Harding testified that Hinkson handed him "a large sum of money." Harding responded with a crude joke: "Who do I have to blow?" According to Harding, Hinkson responded "something like, 'It's not who you have to blow but who you have to kill.'" Harding testified, "I could make this much money killing [Cook, Hines, and Lodge]. He had also a wad with him of some sort; and that was supposed to be another $10,000. There was a $10,000 flat fee, and this was a wad of $10,000." Harding testified that Hinkson then "pulled back . . . and it became a joke." But, Harding testified, "I assumed that I was being tested." He testified further, "And when the $10,000 came up, I thought this was his test."

Bates, who was also in the kitchen, testified about the episode.

> We were at the table in the kitchen. . . . He was saying something along the lines that he would like some of these people dead, and he had a lot of money that he produced from somewhere. And I don't know if – maybe in a joking manner, he offered it to J.C. [*i.e.*, Harding] and said, you know, "Whoever does this, this is theirs," something along those lines from what I can remember.

The prosecutor asked: "Did he say it was a joke?" She answered, "He did not say it was a joke, no."

Bates remained in Hinkson's house in Grangeville, but Harding went back to Southern California to bring Bates's things back in a U-Haul truck. On Harding's return he again stayed in Hinkson's house, "probably" during the second week of January. Harding testified as follows:

> Q. Did you have any further discussions with Mr. Hinkson where he talked about these three feds, federal officials?
>
> A. Every time I talked to Dave. That was on his mind every time when we talked on every occasion.
>
> Q. Did that happen on the second occasion?
>
> A. Absolutely, yes.
>
> . . .
>
> Q. What did he say?
>
> A. That they need to die; they are demons; they need to be tortured. It was sick stuff that I don't like coming out of my mouth. . . . I hate them; they are demons; they need to die; they need to be killed; I have got people working on that. You never know if he is kidding or serious. I want their throats cut; I want them tortured; I want them taken out and shot in the knee caps and told who is having it done and why it's being done.
>
> . . .

> Q. Did he say how he wanted Agent Hines killed or harmed?
>
> . . .
>
> A. No. The second visit . . . it wasn't specific. It was just malicious rhetoric, like I'm saying. He would be killed, executed. Dave becomes a madman when he talks about it. He will, literally, get very angry. It's anything you can think of that is wild. It grew and grew each time.

During this second visit, Hinkson asked Harding to get ammunition for guns that Hinkson kept in the house. Harding testified that Hinkson did not seem to know much about guns, and that he was very interested in what Harding knew about them: "[W]e talked about my knowledge of guns and that I grew up around guns and shotguns. He wanted to know how extensive my background was, the basics of how I got into it and why I was into it." Harding testified that he had worked as a bodyguard, and that Hinkson knew him through a friend who was also a bodyguard:

> Q. How do you know he knew you through another bodyguard?
>
> A. They were good friends. They were close friends.
>
> Q. Who is that?
>
> A. Mark Glover. . . . Him and David – I don't know how – are very close friends. And I

know Mark through doing security work, bodyguarding.

. . .

Q. Have you worked as a bodyguard?

A. Yes.

Q. Have you worked with Mr. Glover?

A. Yes.

Harding became very friendly with Hinkson and frequently stayed at his house in Grangeville on the weekends. During those visits, Hinkson repeatedly discussed killing Cook, Hines, and Lodge.

Q. On the occasions that you go back up to Grangeville, would you see Mr. Hinkson?

A. Yes.

Q. Would you talk to him on the same subject matters of the three federal officers?

A. Extensively.

Q. Did he mention these things about killing federal officers more than once?

A. Every time we spoke, yes.

Q. How many times?

A. Fifty. . . .

Q. Did there come a time when he also offered you money?

A. Yes.

> Q. In relationship to when you first came to Grangeville, that first trip in early January, when would be the second time he offered you money?
>
> A. A couple of weeks, maybe.

The second time Hinkson offered Harding money, the two men were driving to the bank. Harding testified that Hinkson had $10,000 with him.

> Q. What did he say . . . ?
>
> A. Just leading. You could use the cash. Do you need cash? Do you need money. You could use this extra money. Think about it. I never knew if he was serious or kidding. He always talked about it and said it; and it was always leading, like I was supposed to bite.

Harding eventually became convinced that Hinkson had been serious in soliciting him to kill Cook, Hines, and Lodge. When Hinkson solicited him again in March of 2003, Harding contacted the F.B.I. He spoke to Nancy Cook, telling her, "Somebody is going to make an attempt on your life, I believe, if I don't make this phone call." The F.B.I. arranged for Harding to go back to Hinkson's house with a recording device concealed on his body. Possibly because Hinkson suspected the existence of the device, Hinkson said nothing incriminating on that occasion.

b. Evidence Supporting Counts 7 through 9

Counts 7 through 9 charged that between December 2002 and February 2003, Hinkson solicited Swisher to kill Cook, Hines, and Lodge. As noted above, the jury convicted Hinkson on these counts.

I have already described much of the evidence supporting Counts 7 through 9. I recount it here in more detail to facilitate a meaningful comparison to the evidence supporting Counts 1 through 3. Swisher took the stand wearing a Purple Heart pin on his lapel. On direct, he was folksy and garrulous:

Q. Mr. Swisher, how old of a man are you?

A. I turned 68 yesterday.

Q. You live in Idaho?

A. Yes, I do.

Q. For how long?

A. My gosh. Over thirty years.

. . .

Q. How did you have an interest in mining?

A. Well, I have an old friend, who is now dead – bless his soul – and he was one of the – he was the epitome of an Idaho range rider till the day he died. He carried an old, single-action Colt .45 and rode the range in the back country.

Q. My question is: How did you manage to switch careers [to mining]?

A. I'm getting to that, counselor.

Swisher testified that he had expertise in "assaying," and testified at some length about his work for WaterOz testing the concentration of minerals dissolved in the water. Then the prosecutor asked him about his military background, and Hinkson's interest in that background:

Q. Have you ever served in the Armed Forces, Mr. Swisher?

A. Yes.

Q. Did Mr. Hinkson ever ask you about your service in the Armed Forces?

A. Yes.

Q. What branch did you serve in?

A. United States Marine Corps.

Q. Did you ever discuss that with Mr. Hinkson?

A. Yes.

Q. And what was the nature of your discussion with him?

A. As I recall, Mr. Hinkson stated he had been in the Navy. I indicated I had been in the Marine Corps. He asked if I had served in any combat situations. I . . . told him, "Yes."

Q. What else did he ask you about combat situations?

A. He asked if I had ever killed anyone.

Q. What did you say?

A. I told him, "Yes." He asked, "How many?" And I told him, "Too many."

Q. Was that one conversation or several?

A. It may have happened over a period of time.

Q. What period of time?

A. Oh, probably off and on throughout the year 2001.

Swisher testified that Hinkson knew that he was an expert with firearms:

Q. Did you ever claim to Mr. Hinkson that you had proficiency with firearms?

A. I believe he knew that I was an expert rifleman, pistolman.

Q. How did he know that?

. . .

A. I probably told him, and he observed my shooting.

Q. What was the occasion that you went shooting with him?

A. I believe it was probably in December, sometime in December of 2002, that he had a

gentleman from . . . Ukraine, visiting. . . . He said we were going to meet out at an employee's who lived in the country, Mr. Rich Bellon. . . . [W]e shot during the course of the day.

Q. Who did?

A. Myself, Mr. Hinkson, and the Russian gentleman.

. . .

Q. What did you bring?

A. I brought a .22 Henry lever-action rifle and .32 semi-automatic Browning pistol, and a .45 auto.

Q. How was your shooting?

A. I always hit what I aim at.

Q. How was Mr. Hinkson's shooting?

A. Not terribly good.

Q. What were you shooting at?

A. Well, we shot some trap with a shotgun. I only shot maybe a half dozen times because I recently had a pacemaker installed; and a shotgun, a twelve-gauge particularly, kind of jars you around a little. I decided I would quit in due time, but I hit my targets. As I recall, I don't believe David hit any of his.

Swisher described their "trap shooting" as follows:

> The person who wasn't shooting would throw the clay pigeons for the others. You have a spring-loaded hand unit that will kick them out, I expect, thirty, forty yards without any problem at all, airborne. . . . And the challenge is to hit the airborne target when it's across from you.

Swisher testified that Hinkson was very angry at Dennis Albers, whom Swisher also disliked. Swisher testified that sometime shortly after April 2002 Hinkson told him "in private" that he wanted Albers and his family members tortured and killed:

> Q. What was it that Mr. Hinkson said?
>
> A. Well, he started off by talking about how he would like to have Mr. Albers and his family, particularly his wife, Margaret, tortured and killed. And he went into quite a description of the torture.
>
> Q. And what was that?
>
> A. He would – he said he would like to see them stripped, bound, and gagged, and then burned with cigarettes or cigars. And then while Albers was down on his knees observing this occurring to his wife and any other family members that might be present, he wanted to have a plastic bag put over her head so that she would suffocate to death in front of him, along with the other family members. Then he wanted that procedure repeated on Mr. Albers, himself.

Q. Did he want you to do something in that regard?

A. When he finished describing what he wanted done, then he offered me $10,000 a head to do it.

Q. What was his demeanor like when he was telling you these things?

A. He was cool and calm at that time.

Q. What was your response to Mr. Hinkson?

A. I told him he was out of his mind and he needed to knock that kind of BS off, and I didn't even think about it.

Q. How did he respond to that?

A. He just smiled and then didn't reply and changed the subject.

Swisher testified that he had a further conversation "in Hinkson's trailer" in July or August of 2002:

Q. What did Mr. Hinkson say about how he felt about Nancy Cook and Steve Hines?

A. He wanted them treated in the same fashion as he had initially described for Mr. Albers and his family. . . . [H]e asked if I remembered the offer he made regarding Mr. Albers and his family. And I said that, of course, I did. And he said he wanted that done, basically, with Ms. Cook and her family and Mr. Hines and his family. And I told him, again, that he was out of his mind. And I,

> also, went into a little bit of a dissertation because David was a friend at that time. And he said, "Well, you know, I know you're used to it. I mean, you have killed people." I said, "Yes, I have killed people in defense of my life and others; but what you are talking about is murder, and there is a significant difference here. And you need to get it out of your head because, if you continue talking that way, it will get you in trouble. And if you continue talking this way and I think you are serious about this, I will have to report it to the authorities."
>
> Q. How did he respond to that?
>
> A. Well, he got his smile again; and then he changed the subject.

Swisher testified that after Cook and Hines arrested Hinkson in a raid on his house in November 2002, his hostility toward them intensified. Swisher testified, further, that Hinkson had a third conversation in which Judge Lodge was added to the list of intended victims:

> A. [I]n January of '03, he approached me again[,] went through the names of the people that had offended him, and added a federal judge by the name of Lodge to that list. And I, essentially, dropped the hammer at that point on David.
>
> Q. Let me first ask what he asked you to do regarding those people?

A. He wanted them all treated the way that the initial offer regarding Albers and his family had been handled.

Q. Were you to receive anything in return for doing that?

A. At least $10,000 a head. And I made a mental note that, with all of the people he named at that time, we were well over $100,000.

. . .

Q. Did the $10,000 offer include Nancy Cook and Steve Hines?

A. Oh, yes.

Q. Did it include Mr. Albers?

A. Yes.

Q. Did it include the children of those people?

A. Yes.

Q. What did he want done with the children of those people?

A. Treated in the same fashion.

Q. How?

A. Tortured and killed.

Q. Now, you mentioned, this time, you reacted in a different fashion?

A. Yes, I did. I'm afraid I became a bit hostile, myself, at that point in time.

Q. What did you say?

. . .

A. I told him, regarding these matters of trying to kill people or having me murder them for him and so on, that I never wanted to hear that again and to fuck off. And he left.

Q. What was his demeanor like when he was asking you to do this?

A. He was almost in a pleading fashion that last time. He was telling me how harassed he had been and how they had hurt him and they were out to not just get him but to kill him, too, and he just had to have this done; and as his best friend, as he put it at that time, he felt I should do it.

Swisher testified that sometime in the spring or summer of 2003, he finally contacted a law enforcement official. However, he was unsure about the date on which he did so, and he was unforthcoming about the details of what he told law enforcement officials:

Q. When did you contact anyone in legal authority regarding Mr. Hinkson?

A. Oh, I think it was probably just before he was re-arrested in '03. I'm not quite sure of the date there.

Q. Are you talking about spring or summer '03 or what?

A. No. It would have probably been getting close to summer there. Spring, summer, somewhere through there. Sometime after April, I'm thinking.

Q. All right.

A. I might be wrong.

Q. And who did you contact?

A. I contacted the Idaho County Assistant Prosecutor from Grangeville.

Q. Now, is he a State Prosecutor, as opposed to a Federal Prosecutor?

A. Yes. That's correct.

Q. And did you express some concern to him?

A. I did.

Q. Was it regarding Mr. Hinkson?

A. Yes.

Q. Thereafter, were you contacted by the FBI?

A. Yes.

Q. Who contacted you?

A. Mr. Will Long.

Q. That's the person here at the table?

A. Correct, sitting right there.

> THE COURT: For the record, the witness has identified Special Agent Long.
>
> [THE PROSECUTOR]: Thank you, Your Honor. I have no further questions on direct, Your Honor.

The government's direct examination of Swisher filled forty-three pages of transcript. Cross examination, not including Swisher's testimony about the Purple Heart and the "replacement DD-214," filled eighty-three pages. During this cross examination, Swisher made clear that on each of the three occasions when Hinkson solicited him to kill Albers, Cook, Hines, and Lodge, there were no witnesses. Swisher stated plainly: "When he made the three direct solicitations to me, they were made in private."

Much of the cross examination was devoted to showing the extreme hostility between Swisher and Hinkson. This hostility had arisen after Hinkson's supposed solicitations of Swisher to commit murder, for reasons unrelated to the solicitations. Richard Bellon was one of Hinkson's key employees at WaterOz; indeed, the trap shooting had taken place at Bellon's house. Sometime in late 2003, Bellon sued Hinkson. In response, Hinkson brought Swisher into the suit, apparently as a third-party defendant. Swisher then counterclaimed against Hinkson for more than $500,000.

Relations between Swisher and Hinkson became so strained that Swisher accused Hinkson of hiring someone to kill him. Swisher testified that he was

"at a remote area in Idaho County with a Vietnam combat veteran friend." Swisher said that he was sitting in an outhouse when, according to his testimony, someone hired by Hinkson shot at him and missed. However, Swisher admitted that he never saw the person who supposedly did the shooting, and that no shell casings or footprints were ever found.

Only one witness corroborated Swisher's testimony that Hinkson had been interested in, and impressed by, Swisher's military background. That witness was Richard Bellon. Bellon testified that Hinkson "wanted to hire Joe Swisher as a bodyguard." "[H]e felt like he needed to hire [Swisher] because he was trained":

> Q. Did [Hinkson] explain to you how Mr. Swisher was trained?
>
> A. Yes. . . . [I]t was that Mr. Swisher had an extensive military background, that he had been in combat, and that he had killed people during the war. Mr. Hinkson would tell me about that and the details of him, his past.

In his own testimony, Swisher never mentioned that Hinkson had wanted to hire him as a bodyguard. Nor did Swisher ever mention that Hinkson had been interested in his military background because of a desire to hire a bodyguard.

Hinkson took the stand in his own defense. Swisher had already testified that on three occasions Hinkson had solicited him "in private" to commit

murder. Hinkson specifically denied having made such solicitations:

> Q. Mr. Hinkson, Mr. Swisher indicated that he had been solicited by you on a number of occasions. . . . Do you recall that he said that in his testimony?
>
> A. . . . Yeah.
>
> Q. Mr. Hinkson, did you ever have a communication with Mr. Swisher where you asked him to murder anyone?
>
> A. No, sir.

Hinkson had a somewhat different recollection of the excursion to Bellon's house. According to Swisher, they had engaged in trap shooting "during the course of the day." Swisher testified, "I hit my targets." Hinkson testified:

> Q. Do you remember the evening that Mr. Swisher went to Mr. Bellon's house with you for dinner?
>
> A. Yes, I do.
>
> Q. And I believe there was testimony that that occurred in approximately September of '02?
>
> A. Yes, just before his open heart surgery.
>
> . . .
>
> Q. And there was someone who came to dinner that night? Who was that?

A. Roman Polankio from the Ukraine.

. . .

Q. Who fired the gun that evening?

A. I'm not really interested in guns, and I shot it twice. Mostly, Joe [Swisher] shot from his chair because he had a hard time standing. He was pretty sick.

Bellon, at whose home the trap shooting took place, was called by the government to testify. The government did not ask Bellon whether it was true that Swisher was then "pretty sick" with heart disease; that Swisher shot "mostly . . . from his chair"; or that Swisher, though ill and sitting in a chair, successfully hit all of his targets. Those targets, according to Swisher's testimony, had been rapidly moving airborne clay pigeons thirty to forty yards away.

c. Comparison of the Evidence in Counts 1 through 3 and Counts 7 through 9

The background evidence against Hinkson was the same for both Counts 1 through 3 (the Harding-related counts on which he was acquitted) and Counts 7 through 9 (the Swisher-related counts on which he was convicted). It was relevant to all of these counts that Hinkson had a paranoid unstable personality; that he disliked government interference with his affairs; that he particularly disliked Cook, Hines, and Lodge; and that he had asked multiple people on multiple occasions, not limited to Harding

and Swisher, to kill Cook, Hines, and Lodge on his behalf.

The evidence specific to Counts 1 through 3 and Counts 7 through 9 is similar in a number of respects. First, there was evidence that Hinkson believed that both Harding and Swisher were skilled in the use of firearms. Second, there was evidence that Hinkson knew that Harding had been a bodyguard, and that he was interested in using Swisher as a bodyguard. Indeed, Bellon testified that Hinkson's interest in Swisher's military background and skill in firearms stemmed from his interest in using Swisher as a bodyguard. Third, the charged solicitations took place at about the same time. Counts 1 through 3 charged conduct that supposedly took place in January 2003. Counts 7 through 9 charged conduct that supposedly took place between December 2002 and February 2003.

The evidence specific to these counts differed in some respects. However, three of those differences made it more likely that the jury would have convicted on the Harding-related counts rather than on the Swisher-related counts.

First, there was a corroborating witness to one of the charged solicitations of Harding. Bates was a witness to the solicitation in Hinkson's kitchen at the beginning of January. She testified that she saw the "wad" of money on the kitchen table and that she heard Hinkson tell Harding that the money was his if he killed Cook, Hines, and Lodge. Bates testified that

Hinkson had not said that he was joking when he said this. By contrast, Swisher testified that there were no witnesses to any of Hinkson's three solicitations. He specifically testified that all three solicitations took place "in private."

Second, Harding and Hinkson were good friends at the time of the solicitations. They became unfriendly only as a result of Harding's reporting to the F.B.I. that Hinkson had solicited him to commit murder. Swisher and Hinkson also had been good friends at the time of the solicitations. But, by contrast to Harding, Swisher had become a bitter enemy, for reasons unrelated to the solicitations, by the time of trial. Thus, unlike Harding, Swisher had ample reason, unrelated to the solicitations, to wish Hinkson ill when he testified at trial.

Third, Harding testified that Hinkson first solicited him in January 2003 to murder Cook, Hines, and Lodge. He testified that Hinkson solicited him again in March 2003. Immediately after the March solicitation, Harding contacted the F.B.I. In an effort to help the F.B.I., Harding went so far as to wear a secret recording device in an attempt to obtain incriminating evidence against Hinkson. By contrast, Swisher testified that Hinkson solicited him shortly after April 2002 to murder Albers. Swisher testified further that Hinkson solicited him in July or August 2002 to murder Cook and Hines. Finally, Swisher testified that Hinkson solicited him in November 2002 to murder Cook, Hines, and Lodge. Swisher testified that he did not go to a local Idaho prosecutor to report

Hinkson's solicitations until sometime after April 2003.

Harding was so concerned about Hinkson that he went to the F.B.I. within two months of the time Hinkson first solicited him, and immediately after the second time. When Harding contacted the F.B.I., he and Hinkson were still on good terms. Harding testified that he spoke directly to Nancy Cook, one of Hinkson's would-be victims, and told her that he thought she was in danger. Harding then wore a wire at the request of the F.B.I. in an attempt to obtain evidence against someone he clearly thought was dangerous. By contrast, Swisher waited at least a year after Hinkson solicited him to murder Albers, at least nine or ten months after Hinkson solicited him to murder Cook and Hines, and at least three or four months after Hinkson solicited him to murder Cook, Hines, and Lodge before reporting Hinkson to law enforcement officials. Unlike Harding, Swisher called a local Idaho prosecutor rather than the F.B.I., even though federal officers had been threatened, and, unlike Harding, Swisher gave no specifics about what he told law enforcement officials. When Swisher finally contacted the local prosecutor, he and Hinkson were no longer on good terms. There is nothing in the record to indicate that Swisher ever offered to wear a wire or otherwise to help gather incriminating evidence against Hinkson.

In three respects the evidence against Hinkson at trial was stronger in the Swisher-related counts than in the Harding-related counts.

First, Swisher testified that Hinkson believed him to be particularly well qualified to be a killer. Swisher testified that he told Hinkson about his combat experience in Korea, and that he had killed "too many" people. We now know that Swisher was never in combat in Korea and that he never killed anyone, let alone "too many" people. However, there is evidence from both Swisher and Bellon that Hinkson believed the story. Swisher's (falsely claimed) combat experience could well have made a greater impression on Hinkson than Harding's experience with firearms and his work as a bodyguard. There was a great deal of evidence at trial – most of it from Swisher himself – about Swisher's ill-health. But the jury could have concluded that despite Swisher's ill-health, Hinkson could have seen him as a well qualified killer.

Swisher further testified that while trap shooting he had demonstrated to Hinkson that he was an excellent shot. The jury might have had some reason to doubt Swisher's testimony that he hit all of his targets, given that Hinkson described Swisher as a very sick man who sat in a chair while shooting. But the jury could well have disbelieved Hinkson, and could have believed that Swisher had indeed demonstrated to Hinkson on that occasion that he was an excellent shot. The jury could have concluded that an actual demonstration of shooting prowess by Swisher was more impressive to Hinkson than Harding's mere talk about his knowledge of guns.

Second, Swisher testified that during the first solicitation Hinkson's "demeanor" had been "calm and cool," and that during the third solicitation Hinkson's "demeanor" was "almost in a pleading fashion." By contrast, Harding testified that he had difficulty telling whether Hinkson was serious in soliciting the murders. Only after a second solicitation in March did Harding decide that Hinkson had been serious.

Third, Swisher presented himself as a United States Marine who had been wounded in the service of his country. His status as a decorated war hero may have been, for some or all of the jurors, an additional reason to believe his testimony. The jury may have found Swisher particularly credible and sympathetic when, after an accusation by Hinkson's counsel that Swisher was lying about his military record, Swisher dramatically produced his "replacement DD-214" from his pocket. The jury might also, despite the district court's instruction, have penalized the defense for what appeared to be an unfounded attack on a decorated war hero.

Our task is not to replay the first trial except as it might help us predict what would happen if Hinkson is retried on Counts 7 through 9. The question before us is what would happen at a new trial. Specifically, the question is whether the fifth *Harrington* requirement is satisfied: Does the new evidence "indicate that a new trial would probably result in acquittal"?

In the original trial, Swisher was the only witness to provide direct evidence that Hinkson solicited him to commit the killings. On retrial, the government would have no choice but to rely on Swisher to supply the evidence of Hinkson's solicitations. To say that Swisher's credibility would fare poorly at a new trial is an understatement.

At Hinkson's original trial, the jurors almost certainly had the impression that Swisher was a decorated combat veteran. The prosecutor described Swisher in his opening statement as a "Combat Veteran from Korea during the Korean Conflict" who "was not averse to . . . violent, dangerous activity," and stated in his closing argument that Hinkson "understood" that Swisher "had served in combat and killed people." In response to defense counsel's questions, Swisher produced his "replacement DD-214" on the witness stand and testified that he had seen combat in Korea and earned a Purple Heart. Defense counsel asked the district court to instruct the jury to disregard that testimony because he feared that the jury might penalize the defense for wrongly assailing a war hero. Although the court granted defense counsel's request, the court's instruction to the jury referred to Swisher's lapel pin as a "Purple Heart Medal" and a "military commendation."

Defense counsel's efforts to impeach Swisher at the original trial focused on the fact that Swisher and Hinkson, who were once friends, were now bitter enemies who had sued and counter-sued each other. On retrial, impeachment of Swisher would not be so

limited. The parties now know conclusively, based on the Miller and Woodring affidavits, that Swisher forged his "replacement DD-214" and his purported "supporting letter" from Colonel Woodring, and that he used these forged documents in an effort to obtain veterans' benefits. The parties also now know conclusively that Swisher never served in combat or earned any personal military commendations, and that he was not injured in battle overseas but in a private automobile accident near Port Townsend, Washington. And they now know conclusively that Swisher lied under oath during the first trial about participating in secret combat missions in North Korea, about being wounded in action, and about receiving a Purple Heart.

At a new trial, the government could put Swisher on the stand to testify, as he did at the original trial, that he told Hinkson that he was a decorated Korean War veteran who had killed "too many" people. The government could then argue that Hinkson, believing these things, seriously solicited Swisher to kill three government officials. But this time, on retrial, defense counsel and the government would know the truth.

Defense counsel would impeach Swisher by asking if it was true that he was not in fact a Korean War veteran; that he had in fact not won a Purple Heart or other awards; that he had not in fact been injured in combat in Korea but rather in a private automobile accident; and that in fact he had lied to the Idaho Division of Veterans Services about his

injuries and non-existent medals in an attempt to get military benefits to which he was not entitled. That would already be bad enough, but it would get worse.

Defense counsel would also ask Swisher whether, the last time he appeared in court to testify under oath against Hinkson, he wore a Purple Heart lapel pin to which he was not entitled, presented a forged "replacement DD-214," and lied about his military record. This time, defense counsel would not be left defenseless if Swisher were to choose to lie in response to these questions because this time the government would also know the truth. If Swisher were to lie in response to any of the questions, the government would be obligated to correct the record. *See Napue,* 360 U.S. at 269; *Hayes v. Brown,* 399 F.3d 972, 978 (9th Cir. 2005) (en banc).

In short, a new trial would be a disaster for the government. A new jury would not only learn, as the first jury did, that Swisher and Hinkson, once friends, had become bitter enemies by the time Swisher testified. It would also learn, as the first jury did not, that Swisher had no compunction about lying under oath to serve his ends, and that he had lied under oath and produced forged documents at Hinkson's first trial. I therefore conclude, under the fifth part of the *Harrington* test, that a new trial would probably result in acquittal.

6. Summary

Because Hinkson's motion met all five requirements of the *Harrington* test, I would hold that he is entitled to a new trial on the Swisher-related counts of soliciting murder.

Conclusion

The district court committed two errors, either of which was sufficient to reverse its decision and grant Hinkson a new trial. I would reverse the district court's denial of Hinkson's motion for a new trial because the district court erroneously precluded Hinkson from introducing documents into evidence to show that Swisher lied about his military record and forged his "replacement DD-214." I would also reverse the district court's denial of the motion for a new trial because the newly discovered evidence produced in support of the motion satisfies the five-part *Harrington* test.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. **DAVID ROLAND HINKSON,** Defendant-Appellant.	No. 05-30303 D.C. No. CR-04-00127-RCT **ORDER** (Filed Oct. 20, 2008)

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges Silverman and Tallman did not participate in the deliberations or vote in this case.

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DAVID ROLAND HINKSON, *Defendant-Appellant.*	No. 05-30303 D.C. No. CR-04-00127-RCT OPINION

Appeal from the United States District Court
for the District of Idaho
Richard C. Tallman,* Presiding

Argued and Submitted
May 7, 2007 – Seattle, Washington

Filed May 30, 2008.

Before: Procter Hug, Jr., M. Margaret McKeown, and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;
Dissent by Judge McKeown

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* Richard C. Tallman, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

COUNSEL

Dennis P. Riordan, Riordan & Horgan, San Francisco, California, Curtis R. Smith, Idaho Falls, Idaho, for the appellant.

Michael D. Taxay, Counter-Terrorism Section, Alan Hechtkopf, and Elissa Hart, Tax Division, United States Department of Justice, Washington, D.C., for the appellee.

OPINION

W. FLETCHER, Circuit Judge:

Following a two-week trial in federal district court in Boise, Idaho, a jury convicted David Roland Hinkson of soliciting the murder of three federal officials. The government's star witness supporting the conviction was Elven Joe Swisher. Wearing a Purple Heart lapel pin on the witness stand, Swisher testified that he had told Hinkson that he was a Korean War combat veteran and that Hinkson, impressed by Swisher's military exploits, solicited him to kill the officials.

The government maintained in its opening statement to the jury that Swisher was a Korean War combat veteran, and it maintained throughout the trial that Hinkson's understanding of Swisher's military exploits showed that he was serious in his solicitations of Swisher. The government now concedes that

Swisher neither served in combat nor earned any personal military commendations, and that Swisher presented a forged military document in court and repeatedly lied under oath at trial about his military record.

On appeal, Hinkson makes three arguments. First, he argues that the district court wrongly precluded him from introducing evidence showing that Swisher presented a forged document and lied on the stand. Second, he argues that the prosecutor engaged in misconduct when he invoked Swisher's military service in his closing argument despite having substantial reason to suspect that Swisher had not been truthful. Third, he argues that he is entitled to a new trial based upon his discovery after trial of evidence that conclusively establishes Swisher's fabrications.

We agree with Hinkson's third argument. Because Hinkson's conviction substantially rests upon the testimony of a witness who had been conclusively shown, by the time Hinkson moved for a new trial, to be a forger and a liar, we hold that the district court abused its discretion in denying Hinkson's motion for a new trial. We do not reach Hinkson's first and second arguments.

I. Background

In an indictment filed on September 21, 2004, a federal grand jury in Idaho charged Hinkson with soliciting the murders of Assistant U.S. Attorney Nancy Cook, IRS Special Agent Steven Hines and

U.S. District Court Judge Edward J. Lodge. All three officials had been involved in the investigation and prosecution of Hinkson on tax and currency structuring charges. Hinkson appeals his conviction on those charges in a companion case. We affirm that conviction in a separate memorandum disposition.

The superseding indictment in this case contained eleven counts. Counts 1-6 charged that Hinkson, in violation of 18 U.S.C. § 373, sought to persuade an acquaintance named James Harding to murder Cook, Hines and Lodge, first in January 2003 (Counts 1-3) and again in March 2003 (Counts 4-6). Counts 7-9 charged that Hinkson, again in violation of 18 U.S.C. § 373, sought in December 2002 or January 2003 to persuade Swisher to murder Cook, Hines and Lodge. Counts 10 and 11 charged that Hinkson, in violation of 18 U.S.C. § 115, personally threatened to kill the children of Cook and Hines.

Hinkson was convicted on only the Swisher-related counts, Counts 7-9. The jury acquitted Hinkson on Counts 1-3, 10, and 11, and deadlocked on Counts 4-6. Because this appeal involves only the Swisher-related counts, we focus our discussion on them.

At several points during Hinkson's trial, the prosecutor emphasized Swisher's military background, and Hinkson's understanding of that background, in an effort to show the seriousness of Hinkson's solicitations. In his opening statement to the jury on January 11, 2005, the prosecutor stated

that Swisher "was a Marine, a Combat Veteran from Korea during the Korean conflict. He was not adverse to this kind of violent, dangerous activity; but he wanted no part of murdering federal officials." However, during direct examination of Swisher three days later on January 14, the prosecutor did not ask Swisher whether he was, in fact, a Korean War combat veteran. Rather, the prosecutor asked only what had been his branch of service and what he had told Hinkson about his military experience in Korea.

Swisher came to the witness stand wearing a replica of a Purple Heart on his lapel. A Purple Heart is an award given to members of the United States military who are wounded in combat. Swisher testified that he first became acquainted with Hinkson in 2000. According to Swisher, he had done some consulting work for Hinkson's company, WaterOz, and the two men had developed a friendship. Swisher testified that he had served in the Marine Corps. He testified further that he discussed his military exploits with Hinkson on several occasions and told Hinkson that he had been in combat in Korea as a Marine. According to Swisher, Hinkson asked whether he had ever killed anyone, to which Swisher said he responded, "Too many."

Swisher testified that on various occasions in 2001 and early 2002, he and Hinkson discussed Hinkson's legal problems, particularly a civil suit brought against Hinkson by a former WaterOz employee. Swisher testified that Hinkson expressed "considerable" anger toward the employee's lawyer,

Dennis Albers, and spoke in graphic detail about wanting to see Albers and his family "tortured and killed." Swisher testified that Hinkson offered him "$10,000 a head to do it," but Swisher "told [Hinkson] he was out of his mind and he needed to knock that kind of BS off."

Swisher testified that in July or August of 2002, Hinkson began to focus on his problems with federal officials. According to Swisher, Hinkson stated that Cook and Hines "had been harassing him a great deal," "abused the judicial system," "cost him a lot of money," and "didn't deserve to live." Swisher testified that Hinkson asked him if he "remembered the offer he made regarding Mr. Albers and his family" and "said he wanted that done, basically, with Ms. Cook and her family and Mr. Hines and his family." Swisher testified that Hinkson told him, "I know you're used to it. I mean, you have killed people [while serving in the military]." Swisher testified that he replied that he would report Hinkson to the authorities if Hinkson "continue[d] talking that way."

Swisher testified that after Hinkson was arrested on tax charges in November 2002, he and Swisher had further conversations. According to Swisher, Hinkson "was extremely hostile to all of the people who had been involved in that arrest." In January 2003, Hinkson "went through the names of the people that had offended him, and added a federal judge by the name of Lodge to that list." Swisher testified that Hinkson then offered him "[a]t least $10,000 a head" to have "them all treated the way that the initial offer

regarding Albers and his family had been handled" – that is, "[t]ortured and killed." Swisher testified that Hinkson spoke in a "pleading fashion" about how "he just had to have this done." Swisher replied that he "never wanted to hear that again." After that January 2003 exchange, the two men had a serious falling out, eventually resulting in a lawsuit and a nasty feud. Swisher testified that sometime after April 2003 he reported Hinkson's solicitations to a local Idaho prosecutor. At the time of his testimony at Hinkson's trial in January 2005, Swisher was a bitter enemy.

On cross examination, defense counsel did not initially inquire into Swisher's military background. Instead, counsel sought to discredit Swisher by identifying inconsistencies in his testimony and by emphasizing the ongoing feud between Swisher and Hinkson. However, after having indicated that he had no further questions for Swisher, counsel asked to approach the bench. At the sidebar, he told the court, "For quite some time, [the defense has] been trying to dig into [Swisher's] military history." Counsel explained that, "[b]ecause of his age and because of the time of the war, we don't believe he was in the war. We also don't believe that he got a Purple Heart or was in combat." Counsel then told the court that he had just been "handed a letter from the National Personnel Records Center indicating that . . . the records fail to show that [Swisher] ever was recommended for or awarded any person[al] decorations." Defense counsel noted for the record that Swisher was "wearing a Purple Heart on the witness stand, in the presence of the jury."

Still at the sidebar, the prosecutor responded that he never asked Swisher about "winning medals or combat" and had merely asked about "a conversation that [Swisher] had with Mr. Hinkson and what Mr. Hinkson asked him about." The prosecutor did not mention that three days earlier, in his opening statement to the jury, he had stated as a fact that Swisher was a combat veteran from the Korean War. The prosecutor also stated at the sidebar, "For the record, he has a little – I don't know – you know, something stuck in his lapel. If somebody knows what that is, fine. No one has said what it is."

The court permitted the defense to reopen its cross examination of Swisher in order to ask about Swisher's lapel pin and about his service during the Korean War. In response to defense counsel's questions, Swisher testified that he was wearing "a Purple Heart Medal" that had been awarded to him by the U.S. government. He then explained that he had served in combat "[n]ot in the Korean War but following the Korean War." He said, "I was part of a special expedition, Marine Corps Expeditionary Unit that was engaged in combat after the Armistice, in an attempt to free POWs still in secret prison camps in North Korea. And that information still remains classified, so I'm not sure how much more I can say on that."

Over the prosecutor's objection, defense counsel then showed Swisher the just-received letter from the National Personnel Records Center. The letter was dated the day of the cross examination and had been

faxed to defense counsel's office at 2:34 p.m. that afternoon. The letter was signed by Archives Technician Bruce R. Tolbert. The letter (hereinafter the "Tolbert letter") stated:

> [A] U.S. Marine Corps record was located on file at this Center for Mr. Swisher based on the information provided in your request. The USMC record shows Mr. Swisher served on active duty in the USMC from August 4, 1954 to his release from active duty on August 3, 1957. He was subsequently discharged from the USMC reserves on August 3, 1962. In addition, Mr. Swisher's Marine Corps record has been carefully examined by the Military Awards Branch of the office of the Commandant of the Marine Corps, and that office has stated that his record fails to show that he was ever recommended for, or awarded any personal decorations.

Defense counsel asked Swisher whether the letter "might refresh [his] recollection as to whether or not the Government issued [him] a Purple Heart."

After Swisher reviewed the letter, the following exchange took place:

> Q [by defense counsel]: Now, sir, when you are awarded a Purple Heart, are you not given a document reflecting your entitlement to that Purple Heart?
>
> A [by Swisher]: Commonly.
>
> Q: Were you given such a document?

A: Yes.

Q: Where is that document?

A: In my pocket.

Q: May I see it, please?

A: I have a replacement DD-214, if the court will permit me to –

THE COURT: Let me take a look at it, first.

THE WITNESS: It is certified. We had to go clear to Headquarters of the Marine Corps and all over to get it. Because of the classifications, my record, along with the other survivors of that Mission, had been pretty much purged.

THE COURT: Ms. Longstreet, would you tender that to both counsel, please?

[THE PROSECUTOR]: I have a copy, Your Honor.

THE COURT: Just hang on to it.

[DEFENSE COUNSEL]: What was that?

[THE PROSECUTOR]: I have a copy.

[DEFENSE COUNSEL]: May we approach, Your Honor?

At sidebar, out of the hearing of the jury, the exchange continued:

> [DEFENSE COUNSEL]: I am going to – apparently, counsel for the government knew about the validity of the Purple Heart. He just said he has a copy of this.
>
> THE COURT: Have you seen this document?
>
> [THE PROSECUTOR]: He showed me this document this morning, about 9:00 o'clock.
>
> THE COURT: Do you have a copy of it?
>
> [THE PROSECUTOR]: I have a copy of it.
>
> [DEFENSE COUNSEL]: Why didn't you tell us?
>
> [THE PROSECUTOR]: Why should I?

Swisher had pulled from his pocket a single sheet of paper, which was a photocopy of a document purporting to be a Defense Department Form 214, described by Swisher in his testimony as a "replacement DD-214." In box 32, near the bottom of the document, was typewritten: "This document replaces the previously issued transfer document of 8-3-57. Changes and additions have been verified by Command. The original of this DD-214 has been forwarded to headquarters MC (10-15-57). . . . Entitled to wear Marine Corps Expeditionary Medal." Near the middle of the document, in box 26, was typewritten: "SILVER

STAR, NAVY AND MARINE CORPS MEDAL W/ GOLD STAR, PURPLE HEART, NAVY AND MARINE CORPS COMMENDATION MEDAL W/ BRONZE 'V'." In box 27, immediately below, was typewritten: "Multiple shrapnel and gunshot – September 1955, Korea." The document bore the signature "W. J. WOODRING, Jr., Capt., USMC."

On the same page, below the photocopy of the purported Form DD-214, was written: "Filed and recorded at the request of Joe Swisher[.] At 2:40 o'clock p.m. this 2nd day of February 2004[.] ROSE E. GEHRING[,] Ex-Officio Auditor and Recorder Idaho County, Idaho[.] By Dana Stroop[,] Deputy[.] Fee $0[,] 1 pg." (Underlining indicates handwriting; italics indicates stamp; brackets indicate material added by this court.)

The court excused the jury, and the conversation continued. The court asked the prosecutor to confirm that he had seen the document that morning at 9:00 a.m. The prosecutor replied:

> [Swisher] showed it to me at 9:00 a.m. this morning because I had asked – he had mentioned Korea, serving in Korea.
>
> I said, "Wasn't the Armistice in '52?"
>
> He said, "But there was still, you know, combat; and it continues to this day," which I happen to know to be true. There is combat to this day in Korea.

Defense counsel requested a mistrial based on the prosecutor's failure to inform the defense that Swisher had given the government a document that appeared to contradict the letter from the National Personnel Records Center. The prosecutor responded that defense counsel "should have listened to me when I said, 'Don't go there.'" He elaborated:

> I didn't go into anything about his combat or his medals or anything else on my direct. He chose to go down this path, even when I objected to it.
>
> I didn't draw attention to the little pin in Mr. Swisher's lapel. Lots of people wear them. They could be anything. He wanted to make an issue of it.
>
> . . . .
>
> Counsel whipped out his document that he received minutes ago. I believe he probably didn't have enough time to read it and digest it and tried to use that to impeach the witness. That was improper.
>
> . . . .
>
> It was a grandstand play in front of the jury that didn't – that wasn't so grand, and he got caught on it. That's where we are.
>
> There is nothing the Government did that caused him to go in the area he did. We tried to avoid going into this area.
>
> I don't think – you know, I barely had time to look at this myself. It refers to other

> – that this replaces some document previously issued. I don't know what that document is, and it just led me to conclude that this is not a proper area to go into.

The court denied the motion for a mistrial:

> The court finds as a matter of fact that if [Swisher's document] is a copy of a genuine military record – and at this point, I don't have any way to determine that; but it appears to be genuine, at least in appearance.
>
> It indicates consistently with how the witness has testified; that he did, in fact, receive multiple shrapnel and gunshot wounds in September 1955 in Korea; and that he was awarded commendations and medals, including the Purple Heart.

The court stated that "until the receipt of the [Tolbert] letter," the government "had no reason to believe that [Swisher's document] was discloseable under Brady or Giglio because it was not impeaching."

The court offered to "instruct the jury to strike that portion of the cross examination of Mr. Swisher that relates to the Purple Heart. Just tell them to completely disregard all testimony about the Purple Heart." Defense counsel agreed. When the jury returned, the court said:

> Ladies and gentlemen, it's been a long day; and I now realize that I made a mistake

> in allowing the questioning with regard to the Purple Heart Medal.
>
> So I am going to instruct you to disregard completely all of Mr. Swisher's testimony with regard to that military commendation.
>
> You are certainly entitled to consider all of the rest of his testimony. Just everything from where I asked [defense counsel] to reopen, please strike that from your minds; and you are not to consider it as evidence in the case.

The contretemps over the Tolbert letter and the "replacement DD-214" took place on Friday afternoon, January 14. The following Monday, January 17, was a federal holiday. When the trial resumed on Tuesday, the prosecution rested, and the defense called its first witnesses.

The next day, Wednesday, January 19, defense counsel told the court, outside the presence of the jury, that he had obtained information suggesting that the document Swisher had taken from his pocket while on the witness stand – the "replacement DD-214" – was fraudulent. Defense counsel had obtained a photocopy of a different Form DD-214, also recorded by Swisher at the Idaho County Auditor and Recorder's office. However, this Form DD-214 had been recorded in February 2001 rather than February 2004. The earlier-recorded Form DD-214 was identical to the later-recorded form, with the notable difference that none of the medals, commendations, or

wounds was mentioned in the earlier-recorded form. "N/A" was written in box 26 where the Silver Star, Purple Heart, and other awards were specified in the later-recorded form. "N/A" was also written in boxes 27 and 32 where, in the later-recorded form, "Multiple shrapnel and gunshot – September 1955, Korea" and "Entitled to wear Marine Corps Expeditionary Medal" were written.

Defense counsel told the court:

> [T]he indications from the people we have talked to [at the National Personnel Records Center] is that they stand by the [Tolbert] letter of January 14th and that they will provide us with a certified copy of his DD-214 that would not support [Swisher's document]; that [Swisher's document] is a forgery; and that he was never given any of the awards or benefits as indicated on [Swisher's document]; and that, further, if any change had been made in the discharge document, it would have been done on a form DD-215 [rather than a form DD-214]. . . .

Counsel further stated that he believed Swisher had not been wounded in combat but, in fact, had been "injured while in the Service in a car accident in Bremerton, Washington." He stated that the National Personnel Records Center would send Swisher's full military record to the court, but only in response to a subpoena signed by the court. The court signed a subpoena late that day.

Two days later, on Friday morning, January 21, again outside the presence of the jury, the prosecutor provided a photocopy of a letter to the court "for in-camera review." The letter was from Lieutenant Colonel K.G. Dowling, Assistant Head of the Military Awards Branch of the Marine Corps, to Ben Keeley of the Idaho Division of Veterans Services. The letter (the "Dowling letter") was dated December 30, 2004. What appeared to be a "received" stamp was dated January 10, 2005. At the top of the letter was a fax line, indicating that it had been faxed from the "ID. STATE VETERANS SVS" in Lewiston, Idaho, where Keeley's office was located, on Thursday, January 13, 2005. January 13 was the day before Swisher took the stand to testify against Hinkson.

The prosecution has given various answers about when it received the Dowling letter or learned of its existence. On the morning of January 21, when he gave the letter to the district court, the prosecutor stated that he "believe[d] Agent Long got [the letter] the day before by going to the Veterans' Administration." Later, in its opposition to Hinkson's motion for a new trial, the prosecution stated in its brief that the letter was "obtained by federal investigators a few days earlier from the Boise Veteran's Affairs office." In its brief to this court, the prosecution stated that "government investigators obtained [the letter] on or about January 20." Finally, in response to our queries during oral argument, the government's attorney sent us a post-argument letter stating that he had "been informed that investigating agents on the prosecution

team first saw and learned of the Dowling letter on January 18 or 19, at the Boise, Idaho office of the Department of Veteran's Affairs." (Emphasis added.) There is no indication in the record that defense counsel had any idea of the existence of the Dowling letter until the government provided it to the court on January 21.

The Dowling letter indicated that Keeley had earlier contacted the Personnel Management Support Branch of Marine Corps Headquarters, after Swisher attempted to use his "replacement DD-214" to obtain veterans' benefits from the Idaho Division of Veterans Services. Dowling wrote back to Keeley:

> We have thoroughly reviewed the copy of the Certificate of Release or Discharge from Active Duty (DD Form 214) and supporting letter which you submitted on behalf of Mr. Swisher with your request. The documents you provided do not exist in Mr. Swisher's official file. The official DD Form 214 in his record of the same date was signed by Mr. Swisher and does not contain any awards information in box 26, and contains no "wounds" information in box 27. A copy of his official DD 214 is provided as the enclosure. Given this information we have reason to believe that the documents you submitted are not authentic.
>
> Specifically, the DD 214 you submitted on behalf of Mr. Swisher indicates that Mr. Swisher is entitled to the Silver Star Medal, Navy and Marine Corps Medal (Gold Star in

lieu of the Second Award), Purple Heart, and Navy and Marine Corps Commendation Medal with Combat "V." However, our review of his official military records, those of this headquarters, and the Navy Department Board of Decorations and Medals failed to reveal any information that would indicate that he was ever recommended for, or awarded any personal decoration.

Additionally, the Navy and Marine Corps Commendation Medal, which is listed in block 26 of the DD 214 that you submitted did not exist at the time of Mr. Swisher's transfer to the Marine Corps Reserve in 1957. On March 22, 1950, a Metal [sic] Pendant was authorized for issue in connection with a Letter of Commendation and commendation ribbon. On September 21, 1960, the Secretary of the Navy changed the name of the award to the Navy Commendation Medal. On August 19, 1994, the Secretary of the Navy renamed the medal as the Navy and Marine Corps Commendation Medal. It is impossible that the approving officer could have signed an official document in 1957 indicating Mr. Swisher's entitlement to a personal decoration which did not exist in its present form until 1994.

Further review of Mr. Swisher's records reveals that he is not entitled to any service awards, including the Marine Corps Expeditionary Medal, for his service in the U.S. Marine Corps. Mr. Swisher's official military records failed to indicate any information

> that he served in Korea during the period when any awards were authorized. His records show that he was stationed at Camp Fuji and Yokosuka, Japan from March 4, 1955 to May 6, 1956.
>
> There is no information in his military record or his medical record to substantiate his entitlement to a Purple Heart medal. His medical records show that on February 10, 1957, he was involved in a private vehicle accident near Port Townsend, Washington.

Later that same day, the court received Swisher's official military file – "a half-inch-thick stack of materials" – from the National Personnel Records Center in response to its subpoena. The official military file contained a copy of the Dowling letter. Its presence in the file was not surprising, for the Dowling letter stated in its last paragraph: "[Mr. Swisher's] records will be returned to the National Personnel Records Center, and a copy of this letter will be filed in Mr. Swisher's official military records." The file also contained a copy of Swisher's original Form DD-214. This Form DD-214 matched precisely the Form DD-214 that Swisher registered in the Idaho County Recorder's office in February 2001.

The official file also contained the two documents that Keeley had sent to Dowling for evaluation. One of the documents was a copy of the "replacement DD-214" purportedly signed by Capt. W.J. Woodring, Jr., that Swisher had pulled out of his pocket on the witness stand. The other document was a letter

purportedly written to Swisher by Woodring on October 16, 1957. That letter stated:

> I am pleased to inform you that your combat action, awards and citations have been verified. A copy of a replacement DD 214 transfer document, which more accurately reflects your military service, is attached to this correspondence. The original has been forwarded to the Commandant of the Marine Corps at Headquarters Marine Corps in Washington, D.C.
>
> . . . .
>
> When you recover from surgery, both Major Morgan and I encourage you to enter a R.O.T.C. program at the college of your choice. Glad we were able to help.

As indicated above, the Dowling letter stated that "we have reason to believe" that both of these documents "are not authentic."

Outside the presence of the jury, the court stated that a "quick review of the file indicates that Mr. Swisher was, in fact, involved in top secret activities; and it appears that he was awarded the medals that he claims that he was awarded. . . . [The documents] do not appear to be impeaching." The court told counsel that it would conduct a more thorough review of the file over the weekend.

When the trial reconvened on Monday, January 24, the court went through Swisher's official military file with counsel off the record. Then, on the record

and without the jury present, the court stated its conclusions. The file had been sent to the court by the National Personnel Records Center in response to the court's subpoena; the Dowling letter in the file matched the letter provided to the court by the prosecution on Friday; and the Dowling letter concluded that the "replacement DD-214" and the "supporting letter" purportedly signed by Woodring were "not authentic." But the court found the file "very difficult to decipher." The court stated:

> It is not at all clear to me what the truth of the matter is; and I suspect it has something to do with the fact that we are dealing with events that occurred fifty years ago and that, at the time that they occurred, were involving top secret military activities.
>
> So I wanted you to look at it because, obviously, you have to make your own judgment as to what you think the significance of it is.

The court stated that "the problem the court had in reviewing the documents in camera is that the documents we have, themselves, are neither self-authenticating nor self-explanatory."

The court concluded:

> And I do not want to turn this issue into a peripheral mini-trial under Rule 608(b) of the Rules of Evidence.
>
> . . . .

> So the state of the record at this point before the jury is that the jury is not to consider Mr. Swisher's battlefield commendations, or lack thereof, although they can certainly assess his credibility with regard to the extensive cross-examination that was conducted by the defense and see how it jives with all of the other evidence in the case.

Defense counsel replied that, in light of the information now before the court, the defense deserved an opportunity to question Swisher further about his "replacement DD-214" and his military experience. Counsel reiterated that Swisher had worn a Purple Heart on the witness stand.

The prosecutor reminded the court that during his direct examination of Swisher he had not attempted to elicit "for the truth of the matter that Swisher was, indeed, in combat." Instead, he said, the jury heard about "a conversation . . . between Mr. Swisher and Mr. Hinkson regarding Hinkson asking him, 'Were you ever in combat?'" The prosecutor also addressed "what we call a Replica Purple Heart. It's not a real Purple Heart at all." The basis of the prosecutor's conclusion that the lapel pin Swisher wore on the witness stand was "not a real Purple Heart at all" is not clear from the record. The prosecutor maintained to the court that, in any event, whether Swisher was "entitled to wear a Replica Purple Heart or any other kind of little medal on his lapel" was a "collateral issue that arose only on cross-examination."

Defense counsel told the court that he was "concerned about when the Government got [the Dowling letter]," which the prosecutor had provided to the court on Friday morning, January 21. The prosecutor responded, "[W]e got it – I believe Agent Long got it the day before by going to the Veterans' Administration." The prosecutor added that the Dowling letter, standing alone, did not prove that Swisher's "replacement DD 214" was fraudulent. He said:

> What they would really have to prove, if this were to be resolved, is they would have to prove that the substitute DD-214 signed by Captain Woodring, in, I believe, October '57 – . . . that the signature of Captain Woodring was forged; and I would suggest that probably would resolve whether it's correct or not.
>
> How you would prove that something that was signed in 1957 – I doubt very much Mr. Woodring is still with us, but I don't know.

The court agreed that it "was not at all convinced yet" that "the document that Mr. Swisher pulled out of his pocket [was] false or not" because Swisher's military record was not "self explanatory." The court stated, "I have no idea, if somebody is involved in secret military operations, whether or not their personnel file . . . would ever reflect those missions." The court stated that it needed to hear from "a records custodian from the National Personnel Records

Center or someone else who is more familiar with military records and decorations than any of us."

The court ruled that the defense would be permitted to recall Swisher for further cross examination but would not be permitted to introduce any of the documents bearing on his military experience:

> The documents which form the basis for the doubt cast on Swisher's military record and [his] entitlement to wear the Purple Heart are extrinsic evidence probative of a specific incident of untruthfulness.
>
> The court therefore holds that the admission of these documents is barred by Rule 608(b).
>
> . . . .
>
> The proffered documents state, in summation, that Swisher's record does not indicate that he earned any service record or service medals during his military duty; however, other documents available to the court suggest that Swisher might, indeed, have earned such medals.
>
> . . . .
>
> The defense may reference these documents during its cross-examination. . . .
>
> In sum, the court finds that the questionability of Swisher's character for truthfulness may be amply demonstrated to the jury by re-opening cross-examination and by allowing the defense to reference the

> impeaching documents during the cross-examination.
>
> . . . .
>
> . . . . I will let the defense decide which way they want to go; either leave it alone or call him.

The next morning, defense counsel informed the court that, under the conditions imposed by the court, he had decided not to recall Swisher.

The government made several references to Swisher's military experience during closing arguments to the jury. The prosecutor began by explaining the significance of Swisher's testimony:

> The judge will further instruct you that the fourth sort of circumstance that you can consider to be strongly corroborative of Mr. Hinkson's intent to solicit murder would be the fact that an accused believed or was aware that the person solicited had previously committed similar offenses.
>
> Mr. Swisher's testimony was powerful. He talked about how Mr. Hinkson understood that Mr. Swisher had been in the military and had killed a lot of people. He was very impressed by that.
>
> In fact, according to Mr. Swisher, Mr. Hinkson asked, "Have you killed somebody?"
>
> And when Mr. Swisher says, "Yes," Mr. Hinkson's response is not, "Wow, that must

be terrible," but it is, "How many people have you killed?" He was very impressed by that.

The prosecutor stated that "[a]nother reason Mr. Hinkson liked Joe Swisher and they were friends is Mr. Swisher had been in the Marine Corps. Mr. Hinkson had served in the Navy. Joe Swisher told you they talked about their experiences in the Service." The prosecutor stated later, "Mr. Swisher, I suggest to you a reasonable juror could find, told the truth about the solicitation." At the end of the government's closing, the prosecutor stated that Hinkson "understood Mr. Swisher had a military record and that he had served in combat and killed people. It's the kind of person he thinks will do such a thing."

On January 27, 2005, after two days of deliberations, the jury returned a guilty verdict on the Swisher-related solicitation counts. Just over a month later, on March 3, 2005, defense counsel moved for a new trial pursuant to Federal Rule of Criminal Procedure 33 on a number of grounds. *Inter alia*, the motion relied on "newly discovered evidence" that Swisher had produced a forged document in court and had lied under oath on the witness stand. That evidence consisted of an affidavit from Chief Warrant Officer W.E. Miller, the Marine Corps liaison to the National Personnel Records Center, and an affidavit from now-retired Colonel W.J. Woodring, Jr., the Marine Corps officer whose signature appeared on Swisher's original Form DD-214, on the purported "replacement DD-214," and on the purported "supporting letter" for the "replacement DD-214."

Chief Warrant Officer Miller stated, in an affidavit dated February 24, 2005, "As part of my duties . . . I have access to the official United States military records of former members of the USMC which are deposited in the N[ational] P[ersonnel] R[ecords] C[enter] and, among my other responsibilities, I evaluate the authenticity of information, records and documents affecting individual Defense Department transfer documents including DD Forms 214."

Miller concluded that Swisher had never been awarded a Purple Heart. He wrote that his reasons included the following:

> A. Swisher's medical records show that he did not sustain any combat wounds, rather he was involved in a private motor vehicle accident near Port Townsend, Washington on 10 February 1957 and was treated at the hospital at Bremerton, Washington. . . .
>
> B. The DD Form 214 signed by Swisher on 3 August 1957 . . . which is a part of his official U.S. military record contains a specification that he was not entitled to VA benefits[.]
>
> C. Swisher's official U.S. military record indicates that he was subject to an Article 115 disciplinary action resulting in demotion from Corporal to Private First Class on 28 Feb. 56 which involved disobedience to military law during his active tour of duty[.]

D. Swisher's official U.S. military record shows that rather than being assigned to missions in post-War Korea (as claimed by Swisher) he was stationed at Camp Fuji and Yokosuka, Japan from 4 March to 6 May 1956 with no supporting documentation or information to indicate that he participated in any classified Marine Corps expeditionary operation that performed incursions into Korea during his tour of active duty. . . .

E. Swisher asserts that the expeditionary missions he was involved with in Korea were classified as "Top Secret" operations. The U.S. Marine Corps did not perform any classified operations or "Top Secret" operations during Swisher's tour of duty.

Miller also concluded that the "replacement DD-214" that Swisher had presented in court was not an "authentic document." (Miller referred to this document as "Exhibit C.") In addition to the factors enumerated in support of his conclusion that Swisher was not entitled to a Purple Heart, Miller wrote:

A. Military Rules and Procedures require that a DD Form 214 can only be issued and retyped at the Headquarters of the USMC and signed by a designee of the Commandant of the Marine Corps who offices at Headquarters. Capt. Woodring never held such designation.

B. Exhibit C, in box 32 provides: "*[t]his document replaces the previously issued transfer document of 83-57.*" There are no additional records in Swisher's file that support the claim that Swisher's original DD Form 214 was replaced;

C. Exhibit C, box 32, provides: "*[c]hanges and additions have been verified by Command.*" Changes or additions in Swisher's original DD Form 214 if truly "*verified by Command*" would have resulted in verification documents becoming a part of Swisher's official U.S. military record. . . .

. . . .

G. Military policy and procedure which has been in effect since before the time of Swisher's transfer from active duty to the USMC Reserves on 3 Aug. 57 would have directed the issuance of a DD Form 215 first, before any replacement version of Swisher's original DD Form 214 would have been issued. . . .

H. There is no record of a DD Form 215 ever having been issued for Swisher.

(Emphasis and brackets in original.)

Now-retired Marine Corps Colonel W.J. Woodring, Jr., in an affidavit dated February 27, 2005, stated:

2. I spent 35 years 6 months in the United States Marine Corps. I was a Captain in

the Marine Corps in 1957. I am now retired and I reside in Southern California.

3. I have reviewed Exhibit A attached which purports to be a copy of a letter addressed to Pfc Elven Joe Swisher (Swisher) dated 16 Oct 1957. I did not write or cause Exhibit A to be written. Below the words Semper Fidelis, there is handwriting that purports to be my signature. I did not sign Exhibit A. What looks like my signature on Exhibit A is actually the image of my signature that has somehow been superimposed upon the letter. Exhibit A is a forgery.

4. I have reviewed Exhibit B attached which purports to be a copy of a "Replacement DD 214" for Swisher. In box 34b there is handwriting that purports to be my signature. I did not sign Exhibit B. What looks like my signature on Exhibit B is actually the image of my signature that has somehow been superimposed upon the letter. Exhibit B is a forgery.

On April 22, 2005, the court denied Hinkson's motion for a new trial. Applying the criteria set forth in *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003), the court gave several reasons for declining to grant a new trial on the basis of newly discovered evidence. First, the court concluded that Hinkson had not been diligent in seeking the evidence he now submitted to the court. Second, the

court concluded that the evidence was not "newly discovered" because "[t]he substance of both proffered documents is not new and is generally cumulative of previously available information." Finally, "[m]ost importantly," the court concluded that "the proffered 'new' evidence is not material to the issue at trial, nor would a new trial probably result in an acquittal, because the evidence is inadmissible." The court explained that it had "previously held on the record at trial . . . and now reiterates, admission of the proffered documents and testimony is still prohibited by Fed. R. Evid. 608(b), which bars introducing extrinsic evidence of the witness's past conduct."

Hinkson was sentenced on June 3, 2005, for his solicitation convictions as well as for his tax evasion and currency structuring convictions. He received a total of 43 years in prison: ten years on the tax and structuring charges, ten years on each of the three solicitation charges, and an additional three years for having made the solicitations while on pretrial release in the tax case.

II. Subsequent Indictment and Conviction of Swisher

On July 30, 2007, the government indicted Swisher for knowingly wearing military decorations to which he was not entitled, including the Purple Heart, in violation of 18 U.S.C. § 704(a); for willfully and knowingly making false representations about his military service in order to obtain benefits to

which he was not entitled, in violation of 18 U.S.C. §§ 1001(a)(2) and 1001(a)(3); and for presenting false testimony and a "forged form DD-214" in order to obtain benefits to which he was not entitled, in violation of 18 U.S.C. §§ 641 and 642. As the date of the indictment makes clear, the government indicted Swisher more than two years after the district court ruled on Hinkson's motion for a new trial. On April 11, 2008, Swisher was convicted on all three counts of the indictment.

Because Swisher's indictment and conviction did not come down until after the district court ruled on Hinkson's motion for a new trial, the district court obviously could not have considered them in reaching its decision. We also do not consider them in reaching our decision today.

III. Motion for New Trial

On appeal to this court, Hinkson moves for a new trial based on three arguments. First, Hinkson argues that the district court erred in precluding him from introducing evidence to show that Swisher lied about his military record and forged his replacement DD-214. Second, Hinkson argues that the prosecution engaged in misconduct by referring to Swisher's military background during its closing argument despite the doubts that had been raised about the veracity of Swisher's testimony. Third, Hinkson argues that he is entitled to a new trial, because, based on the new evidence, it is now undisputed that

Swisher proffered a forged document and testified falsely in court. We reach only the third argument.

Hinkson's motion for a new trial asserted that the Miller and Woodring affidavits proved conclusively that Swisher had presented a forged document and had lied under oath. The government does not now dispute that the "replacement DD-214" was forged and that Swisher lied about his military experience. It contends, however, that Hinkson has not satisfied the standard for obtaining a new trial.

We review a district court's denial of a motion for a new trial based upon newly discovered evidence for abuse of discretion. *See, e.g., United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995). A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when we are left with "a definite and firm conviction that the district court committed a clear error of judgment." *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007) (internal quotation marks omitted).

Under *United States v. Harrington*, 410 F.3d 598 (9th Cir. 2005), a criminal defendant must satisfy a five-part test in order to prevail on a motion for a new trial:

> (1) [T]he evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial;

> (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal.

Id. at 601 (quoting *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991)). The district court applied this *Harrington* test, citing *Waggoner*, 339 F.3d at 919.

What we today call the *Harrington* test is sometimes referred to as the "*Berry* rule," named for the nineteenth-century case from which it derives. *See* 3 Charles Alan Wright et al., *Federal Practice and Procedure* § 557, at 541 (3d ed. 2004) (citing *Berry v. State*, 10 Ga. 511, 527 (1851)). Although we ordinarily state the test as comprising five requirements, we have recognized that requirements (3), (4), and (5) are duplicative. That is, newly discovered evidence is "material" when the result of the newly discovered evidence is that "a new trial would probably result in acquittal," a condition that is not usually met when the newly discovered evidence is "cumulative [ ]or merely impeaching." *See, e.g., United States v. Krasny*, 607 F.2d 840, 845 n.3 (9th Cir. 1979) (noting that the materiality and probability requirements "are really two means of measuring the same thing"); *United States v. Davila*, 428 F.2d 465, 466 (9th Cir. 1970) (per curiam) (noting that newly discovered impeachment evidence supports a new trial if "it is likely that the jury would have reached a different result" in light of the evidence); *see also* Wright et al., *supra*, § 557, at 552.

The character of the defendant's newly discovered evidence determines how strictly we apply the *Harrington* test's probability requirement. Our usual rule is that newly discovered evidence does not entitle a defendant to a new trial unless the evidence indicates that it is more probable than not that the new trial will result in acquittal. This rule applies to most newly discovered evidence, including newly discovered evidence suggesting that evidence presented at the defendant's trial may have been false. *See Krasny*, 607 F.2d at 842.[1]

We conclude that Hinkson has satisfied all five parts of the *Harrington* test. The dissent concludes that Hinkson has satisfied *none* of them. In form, the dissent is in two parts. The first part discusses the likelihood that a new trial will result in an acquittal. Diss. at 6169-74. The second part discusses the five *Harrington* requirements. *Id.* at 6174-83. Because the likelihood of an acquittal on retrial is the fifth *Harrington* requirement, we respond to the first part of the dissent in our discussion of that fifth requirement.

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[1] We have sometimes applied a less demanding standard for granting a new trial where it is known conclusively at the time of the new trial motion that the evidence presented at trial was false. *See Hall v. Director of Corrections*, 343 F.3d 976 (9th Cir. 2003); *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002); *United States v. Young*, 17 F.3d 1201 (9th Cir. 1994). Because we hold that Swisher is entitled to a new trial under the *Harrington* test, it is unnecessary to apply this test.

A. Newly Discovered Evidence

Under the first part of the *Harrington* test, we must determine whether the evidence presented in support of the motion for a new trial is "newly discovered." Hinkson's new trial motion relied on two new pieces of evidence: (1) the affidavit from Chief Warrant Officer Miller, the Marine Corps liaison to the National Personnel Records Center; and (2) the affidavit from Colonel Woodring, the officer whose purported signature appeared on Swisher's "replacement DD-214" and "supporting letter." It is undisputed that neither piece of evidence was known to or in the possession of the defense (or the government) until after Hinkson's trial had concluded. This evidence thus qualifies as "newly discovered."

The dissent disagrees. It concedes that both the Miller affidavit and the Woodring affidavit are newly discovered evidence, stating that "it goes without saying" that "they were not procured until *after* trial." Diss. at 6176-77 (emphasis in original). But the dissent contends that this is a "superficial analysis" because "[a]s the district court noted, 'the substance of both proffered documents is not new.'" *Id.* In contending that the "substance" of the new documents is not new, the dissent is contending that their substance was already known. In other words, the dissent is saying that the evidence contained in the documents is merely cumulative of evidence that was already known. That argument is properly addressed to the third Harrington requirement. We address that

argument in detail below. We respond only briefly here.

The dissent's contention would be more persuasive if the district court had not clearly indicated during trial that, in its view, the existing evidence was insufficient to show that Swisher had lied about his military record and awards. After reading the half-inch-thick file received on January 21 from the National Personnel Records Center, the district court concluded, "It is not at all clear to me what the truth of the matter is[.]" The court indicated that the file was "very difficult to decipher" and not "self-explanatory." It concluded by saying that it could not resolve its uncertainty without "hearing from" a military "records custodian" or similar person. The prosecutor added that what was needed in order to show the falsity of the "replacement DD-214" was an affidavit from Colonel Woodring stating that his signature had been forged.

As we will discuss in more detail below, the proffered documents – the Miller and Woodring affidavits – were precisely the evidence that the district court and the prosecutor on January 21 had described as fatally lacking. The Miller affidavit provided precisely the explanation the district court had said it needed to "decipher" the documents in Swisher's file. The Woodring affidavit was precisely the evidence the prosecutor had said was needed to prove the falsity of the replacement DD-214. Given this background, it is impossible to conclude that the

"substance" of the Miller and Woodring affidavits was not new.

B. Diligence

Under the second part of the *Harrington* test, we ask whether the failure to discover the evidence sooner resulted from a "lack of diligence on the defendant's part." *See Kulczyk*, 931 F.2d at 548. A court cannot conclude that a defendant lacks diligence merely because a defense team with unlimited time and resources might have managed to discover the evidence sooner. Instead, mindful of the constraints and competing pressures on the defense before and during trial, a court asks whether it was unreasonable for the defense to have failed to discover the evidence more promptly. "All that is required is ordinary diligence, not the highest degree of diligence." 3 Wright et al., *supra*, § 557, at 559-60.

The district court concluded that Hinkson had not been sufficiently diligent in discovering the new evidence. It wrote, "[T]he Court finds that Defendant is unable to establish that the failure to discover this evidence was not due to his counsel's lack of diligence. . . . [T]he Court finds that defense counsel had ample time to investigate Swisher's record prior to trial, but was not diligent in pursuing the issue."

In support of its conclusion that Hinkson had not been diligent, the district court pointed out that Swisher had testified to receiving "battlefield injuries" from his military service during an October 11,

2004, deposition in a civil suit involving Swisher and Hinkson. Hinkson was represented in that suit by Wesley Hoyt, one of the two attorneys representing him in his criminal case. In further support of its conclusion, the district court pointed out that Swisher had discussed his purported war injuries in grand jury testimony on April 16, 2002, and February 10, 2004.

Swisher's deposition in the civil case took place just three months before the start of Hinkson's criminal trial. That was the first time Hinkson was put on notice of Swisher's claimed "battlefield injuries." It is true, as the district court wrote, that Swisher gave grand jury testimony in 2002 and early 2004. But the district court was wrong to rely on the dates of the grand jury testimony. The *government* knew about Swisher's grand jury testimony, and thus the government was put on notice in 2002 and 2004 of his claimed "battlefield injuries." However, precisely because it was grand jury testimony, that testimony was kept from Hinkson. The government finally turned Swisher's grand jury testimony over to Hinkson pursuant to the Jencks Act. It did so on January 4, 2005, one week before trial.

On January 14, when defense counsel sought to reopen his cross examination of Swisher in order to question him about the Tolbert letter, counsel stated to the court, "For quite some time, we have been trying to dig into his military history because we don't believe it's accurate." Then, after Swisher pulled the "replacement DD-214" out his pocket, defense

counsel stated at the sidebar that the defense had "been trying to get Mr. Swisher's military records *for about ninety days*; and we have very little control over when that happens." (Emphasis added.) Thus, we know from the trial transcript that the defense began to look into Swisher's military record immediately after his deposition. We also know that government military authorities, over whom defense counsel had "very little control," had been slow to respond.

In our view, defense counsel were diligent in looking for evidence that could be used to impeach Swisher. Indeed, counsel were successful in finding such evidence. As a result of their efforts, defense counsel received the Tolbert letter from the National Personnel Records Center while Swisher was still on the stand. The letter recounted that Swisher did not enter active duty until 1954. It stated that "Swisher's Marine Corps record has been carefully examined by the Military Awards Branch . . . , and that office has stated that his record fails to show that he was ever recommended for or awarded any personal decorations."

Defense counsel reasonably viewed the Tolbert letter as exactly the sort of impeaching evidence it had been seeking. Counsel hoped that Swisher, when confronted with the letter, would be forced to admit that he was not the decorated combat veteran he purported to be. Counsel could hardly have anticipated that Swisher, after being shown the letter, would pull from his pocket a forged document purporting to provide a superseding account of his military service.

Until that moment, there was little reason for the defense to suspect the existence of Swisher's "replacement DD-214," let alone to suspect that the document was a forgery.

After learning of the "replacement DD-214" on Friday, January 14, the defense was quick to investigate its authenticity. On Wednesday, January 19, following a long holiday weekend, defense counsel informed the court that they had learned that Swisher had recorded two different DD-214 forms with Idaho County, and that the earlier-recorded DD-214 was "devoid of any . . . honors and medals." Counsel also stated that they had spoken to staff at the National Personnel Records Center who stated that the Center stood by the conclusions of the Tolbert letter but would not release additional documents about Swisher without a subpoena from a judge. The court agreed to subpoena Swisher's military file, which arrived two days later, on Friday, January 21.

The court kept Swisher's military file to review over the weekend, and then disclosed it to counsel on Monday, January 24, the last full day of testimony before closing arguments. The court ruled that it would allow the defense to recall Swisher for further cross examination, but would not allow the defense to introduce into evidence any of the military documents obtained. The court stated further that it did not want to conduct a mini-trial during which the government would put experts on the stand to explain the documents. Once Hinkson's trial concluded, the

defense was diligent in obtaining the evidence from Woodring and Miller. It filed its motion for a new trial one month after trial. *See* Fed. R. Crim. P. 33(b)(1) (providing that motions for a new trial "grounded on newly discovered evidence must be filed within 3 *years* after the verdict" (emphasis added)).

Even though the government had its own duty to investigate Swisher's military record, having been alerted "of the real possibility of false testimony," *Bowie*, 243 F.3d at 1118, the government fared far worse than defense counsel. Because it had participated in the grand jury proceedings, the government knew long before defense counsel that Swisher had given inconsistent testimony about his military experience. Swisher's first grand jury testimony was in April 2002, more than two and a half years before Hinkson's trial. The government's suspicions eventually led to its discovery of the Dowling letter. Government prosecutors maintain that they did not obtain the Dowling letter until sometime shortly before they gave it to the court on the morning of January 21. So far as the record shows, the government was never able to obtain expert analysis of Swisher's military file other than the Dowling letter and was never able to locate Colonel Woodring.

The defense's strategic decision not to recall Swisher to the stand for further cross examination at the end of the defense case does not alter our conclusion that defense counsel acted diligently. The diligence requirement is addressed to diligence in discovering evidence, not to strategic decisions about

how to use evidence already in hand. But even if the diligence requirement were expanded to cover a strategic decision not to recall Swisher, we believe that defense counsel's decision was eminently sound. Under the conditions imposed by the district court, further cross examination of Swisher would not have helped the defense to uncover or to present to the jury evidence showing Swisher's fabrications. The district court's ruling precluded the defense from introducing into evidence any of the documents received by the court in response to its subpoena, including the Dowling letter. Having already been embarrassed once by Swisher, defense counsel was understandably reluctant to attempt another cross examination under the conditions imposed by the court. While the defense might possibly have managed to create some doubt in the mind of jurors about Swisher's truthfulness, there was a significant possibility that Swisher would have defended himself with additional fabrications, leaving the jury with the impression that the defense was making further unfounded attacks on a decorated war hero.

The dissent contends that the district court did not clearly err in finding that Hinkson was not sufficiently diligent in discovering the new evidence. The dissent would be on firmer ground if the district court had not relied on the fact that Swisher had mentioned his battlefield injuries during his grand jury testimony in 2002 and 2004. This was clear error by the district court. Because grand jury testimony is secret, Hinkson could not have known about it in

2002 and 2004. Only the government knew about it, and the government did not reveal the grand jury testimony to Hinkson until a week before trial.

The dissent further contends that Hinkson was not diligent because he could have subpoenaed witnesses to testify at trial about Swisher's military record. This contention is fanciful. The district court made it quite clear that, in its view, the dispute over Swisher's military record concerned a collateral impeaching matter, and that Hinkson would not be permitted to introduce *anything* into evidence that would show that Swisher had lied about his military record, including documents from Swisher's official personnel file. It also stated clearly that it did not want government experts testifying about Swisher's records. If the district court would not allow into evidence documents from Swisher's personnel file because they addressed a collateral issue, and if it did not want testimony from government experts, it is obvious that it would not have permitted live testimony of defense experts on that same issue.

C. Material to the Issues at Trial

The third part of the *Harrington* test requires that the newly discovered evidence be "material to the issues at trial." In the context of a new trial motion under *Harrington*, materiality has a special meaning. Materiality under *Harrington* does not require that the evidence in question would have been material at the original trial. Rather, materiality

under *Harrington* requires that the evidence in question will materially alter the result on *retrial*. In many cases, there will be little or no practical difference. *See, e.g., United States v. George*, 420 F.3d 991, 1001 (9th Cir. 2005) (analyzing materiality in terms of the first trial). But the *Harrington* test is clearly framed in terms of what will happen on retrial rather than what happened at the original trial. *See Harrington*, 410 F.3d at 601 ("[T]he evidence must indicate that a new trial would probably result in acquittal[.]"); *see also Krasny*, 607 F.2d at 844 ("Yet, we have always required a showing that the new evidence would 'probably' result in an acquittal upon a new trial.") and 845 n.3 (explaining that materiality and probability "are really two means of measuring the same thing"). As we discuss below, in addressing *Harrington*'s fifth requirement, we conclude that the newly discovered evidence of Swisher's fabrications makes it probable that a new trial will result in acquittal. Thus, we also conclude that the new evidence is material under *Harrington*.

Relying on *United States v. Davis*, 960 F.2d 820 (9th Cir. 1992), the dissent contends that the Miller and Woodring affidavits are not material because they address a "collateral issue." Diss. at 6181. Specifically, the dissent quotes from the following sentence in *Davis*: "Ordinarily, evidence impeaching a witness will not be material under *Walgren* [an earlier version of *Harrington*] because it will not refute an essential element of the government's case." *Davis*, 960 F.2d at 825. In the dissent's view, impeaching

evidence is necessarily evidence that relates to a "collateral issue" and is therefore not material. However, we explicitly recognized in *Davis* that impeaching evidence can be material in a new trial motion. For example, we wrote, "[T]he newly discovered impeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it would render the witness' testimony totally incredible." *Id.*

Further, the dissent relies on evidentiary rulings made by the district court. The dissent notes that the district court held that impeaching documents relating to Swisher's military record were inadmissible under Federal Rule of Evidence 608(b). The dissent further notes that the district court excluded the evidence under Rule 403. The dissent concludes, "These evidentiary rulings also undermine the defense's claim that impeachment of Swisher's military record will blossom into substantive evidence at a new trial." Diss. at 6183.

Although the district court's evidentiary ruling under Rule 403 was almost certainly not an abuse of discretion, its ruling under Rule 608(b) was almost certainly legal error. Rule 608(b) forbids the introduction of extrinsic evidence for the purpose of attacking a witness's credibility. But evidence contradicting a witness's statement is not barred by Rule 608(b). If Swisher had not worn the Purple Heart pin onto the witness stand, the district court's ruling under Rule 608(b) would have been correct. But Swisher came onto the witness stand wearing a Purple Heart lapel

pin, thereby indicating that he had been wounded in combat while serving in the United States armed forces. Under Rule 801(a), "[a] 'statement' is . . . nonverbal conduct of a person, if it is intended by the person as an assertion." In his opening statement to the jury, the prosecutor had described Swisher as a "combat veteran." Particularly given the prosecutor's statement, it is difficult to interpret Swisher's wearing of the Purple Heart as anything other than "nonverbal conduct . . . intended . . . as an assertion."

The dissent appears to suggest that because the district court properly excluded the impeaching documents from evidence under Rules 608(b) and 403, these documents could have no material effect on retrial. Even if this were true (which it almost certainly is not with respect to Rule 608(b)), this is irrelevant under *Harrington*. The test under *Harrington* is not (to use the dissent's words) whether the newly discovered documents impeaching Swisher go to a "collateral issue"; not whether the documents were or would be "inadmissible extrinsic evidence" under Rule 608(b); and not whether the documents will "blossom into substantive evidence." The materiality test under *Harrington* is whether the newly discovered evidence – the Miller and Woodring affidavits – would probably result in acquittal on retrial.

As we discuss in detail in part five of the *Harrington* test, we conclude that the Miller and Woodring affidavits indeed would probably result in acquittal on retrial. The affidavits would not even have to be admitted into evidence to have this effect.

Now that both sides conclusively know the truth, if Swisher is asked about his military record, and is asked whether he lied under oath about that record at the first trial, the truth will come out. Now that the truth is known, Swisher may decide to give a truthful answer. Or, if Swisher tries to lie again, the government will have a professional obligation to correct the record.

D. Neither Cumulative nor Merely Impeaching

The fourth part of the *Harrington* test requires that the new evidence be "neither cumulative nor merely impeaching."

1. Cumulative

The district court concluded that "[t]he substance of both proffered documents is not new and is generally cumulative of previously available information." The "previously available information" to which the court referred are the documents that came to light at three different points during the trial: first, the Tolbert letter used by defense counsel to cross examine Swisher on January 14; second, the Dowling letter, which the prosecution gave to the court on the morning of January 21 and which the court also received later that day as part of Swisher's official military file; and third, the remainder of Swisher's official military file, which the court received on the afternoon of January 21.

During trial, the district court concluded that these documents established neither that the "replacement DD-214" was fraudulent nor that Swisher's testimony was false. On Monday, January 24, after reviewing Swisher's military file, including the Dowling letter, over the weekend, the court told counsel outside the presence of the jury that it found the file "very difficult to decipher," and stated that "the truth of the matter" was "not at all clear." The court told counsel that the documents in the file were "neither self-authenticating nor self-explanatory" and did "not conclusively decide the issue." The court concluded that it was "not at all convinced" that it had enough evidence to "resolve the question of whether or not the document that Mr. Swisher pulled out of his pocket is false or not."

The court remained uncertain at trial about the truthfulness of Swisher's testimony and the authenticity of the "replacement DD-214," despite the fact that Swisher's military file was a government record that the court itself had subpoenaed, and despite the fact that the file contained the Dowling letter. The Dowling letter, written by an officer in the Headquarters of the U.S. Marine Corps, stated in plain language that the "replacement DD-214" was a forgery and that Swisher had not earned any personal military commendations. Another factfinder may have found this evidence sufficient to establish that Swisher was a forger and a liar. But we accept the district court's judgment that the evidence then before it was inconclusive.

The district court stated during trial that "the only way" to resolve the uncertainty surrounding the "silent file" would be to hear from "a records custodian from the National Personnel Records Center or someone who is more familiar with military records and decorations than any of us." The prosecutor agreed with the court's assessment and added:

> What [the defense] would really have to prove, if this were to be resolved, is that . . . the substitute DD-214 signed by Captain Woodring, in, I believe, October '57 – that . . . the signature of Captain Woodring was forged; and I would suggest that probably would resolve whether it's correct or not.
>
> How you would prove that something that was signed in 1957 – I doubt very much Mr. Woodring is still with us, but I don't know.

Precisely the additional evidence the court said was lacking was supplied by the defense in its motion for a new trial in the form of the affidavit from Chief Warrant Officer Miller. Miller is the U.S. Marine Corps "Liaison Officer to the National Personnel Records Center." His job is to "evaluate the authenticity of information, records and documents affecting individual Defense Department transfer documents including DD Forms 214." Miller concluded, after a thorough investigation, that the replacement DD-214 was a forgery and that Swisher had not earned a Purple Heart or any other personal commendation.

Similarly, precisely the additional evidence the prosecutor said was lacking was supplied in the form of the affidavit from the now-retired Colonel Woodring. As it turned out, possibly to the prosecutor's surprise, Colonel Woodring is indeed "still with us." Colonel Woodring stated unequivocally in his affidavit that his signatures on both the purported 1957 letter to Swisher and the replacement DD-214 were forgeries.

In sum, the court stated at trial that the evidence before it was insufficient to allow it to determine the truth or falsity of Swisher's evidence. Defense counsel then presented to the court, in support of the motion for a new trial, precisely the additional evidence the court and the prosecutor said was needed to resolve the uncertainty. We conclude that, in this circumstance, this new evidence was not cumulative.

The dissent concludes that the Miller and Woodring affidavits are cumulative because "the Tolbert letter and the Dowling letter . . . established . . . that the replacement DD-214 was a forgery and that Swisher had lied about receiving military awards." Diss. at 6183. As we noted above, the dissent would be on firmer ground in so concluding if the district court had agreed with this statement. However, the district court was very clear in saying precisely the opposite of what the dissent now says. As we have just explained, the district court concluded that Swisher's entire personnel file, including the Tolbert and Dowling letters, was insufficient to "establish that the replacement DD-214 was a forgery

and that Swisher had lied about receiving military awards." Given the district court's view of the evidence then available, it is impossible to conclude that the Miller and Woodring affidavits are cumulative.

2. Merely Impeaching

The fourth part of the *Harrington* test states that a defendant must show that the newly discovered evidence is not "merely impeaching." We have expressly rejected the proposition that "impeachment evidence . . . is *never* sufficient to warrant a new trial under Fed. R. Crim. P. 33." *Davis*, 960 F.2d at 825 (emphasis in original); *see also United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) (as amended) (concluding that new evidence impeaching the government's central witness was powerful enough to require a new trial); *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991) (explaining that the prohibition on using impeachment evidence to secure a new trial should not be "taken at face value"); *Balestreri v. United States*, 224 F.2d 915, 917 (9th Cir. 1955) ("To deny in every case a motion for a new trial on the ground of newly discovered evidence for the sole reason that the evidence was 'merely impeachment' might often lead to injustice.").

We recognized in *Davis* that enforcing a per se prohibition on impeachment evidence as the basis for a new trial would be inconsistent with the spirit of Rule 33, which "permits the granting of a new trial motion 'if required in the interest of justice.'" *Davis*,

960 F.2d at 825. A per se prohibition would also be inconsistent with our longstanding refusal to draw a "categorical distinction between types of evidence." *Taglia*, 922 F.2d at 415; *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (refusing to distinguish between exculpatory and impeachment evidence in the *Brady* context); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (refusing to distinguish between exculpatory and impeachment evidence in cases involving prosecutorial misconduct). Accordingly, we recognized in *Davis* that sometimes "newly-discovered impeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness' testimony totally incredible. In such a case, if the witness' testimony were uncorroborated and provided the only evidence of an essential element of the government's case, the impeachment evidence would be 'material' under [the *Harrington* test]." *Davis*, 960 F.2d at 825; *Taglia*, 922 F.2d at 415 (holding that a new trial would be warranted under Rule 33 if it were discovered after trial that the government's star witness was "utterly unworthy of being believed because he had lied consistently in a string of previous cases"); 3 Wright et al., *supra*, § 557, at 560, 563 (noting that impeachment evidence is usually "not sufficient to justify a new trial," but that this is not an "invariable rule," and "in flagrant cases it may suffice").

In its order denying Hinkson's new trial motion, the district court wrote that "the proffered evidence [*i.e.*, the Miller and Woodring affidavits] is

impeachment evidence and so is not a valid basis for a new trial." It is apparent from this statement that the district court mistakenly believed that impeachment evidence may never provide the basis for a new trial. Our cases do not so hold. The relevant question under *Harrington* is whether the newly discovered evidence makes it probable that a new trial would result in acquittal.

The dissent relies on *Davis* to conclude that the Miller and Woodring affidavits are impeaching and therefore cannot satisfy the fourth requirement of *Harrington*. It relies on the sentence from *Davis*, quoted above, stating that if the impeached witness's testimony was "uncorroborated and provided the only evidence of an essential element of the government's case," impeachment evidence would satisfy *Harrington*. *Davis*, 960 F.2d at 825; diss. at 6183. The dissent writes, "But that circumstance does not describe the evidence here." *Id.* The dissent is wrong.

An essential element of the government's case was that Hinkson solicited Swisher to murder Cook, Hines and Lodge. *See* 18 U.S.C. § 373. To qualify as a solicitation under § 373, the defendant must have had an "intent" that the object of the solicitation actually be carried out. *Id.* at § 373(a). That is, the solicitation must have been serious.

There was ample evidence presented at trial that Hinkson asked many people, not only Swisher, to murder Cook, Hines and Lodge. However, the question before us is not whether Hinkson solicited

someone else to commit murder. The question is whether Hinkson solicited *Swisher* to commit murder within the meaning of § 373. On that precise question, Swisher was the only witness.

As we describe in detail in the next section, the government contended that Hinkson seriously solicited Swisher to commit murder. The first solicitation was to kill Albers, but that solicitation was not charged in the indictment. The second and third solicitations, which *were* charged in the indictment, were to murder Cook, Hines and Lodge. Swisher testified unambiguously that there were no corroborating witnesses who would have been able to confirm that any of these solicitations were serious. According to Swisher's explicit testimony, all three solicitations were "in private." Because the solicitations to murder Cook, Hines and Lodge were made "in private," there was by definition no corroborating witness to an essential element of the government's case.

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E. Probability of Acquittal on Retrial

The fifth *Harrington* requirement is that "the new evidence must indicate that a new trial probably would result in acquittal." The dissent summarizes and characterizes the evidence presented at trial in an effort to show that a new trial would probably not result in an acquittal. In our view, the dissent has provided an incomplete description of the evidence. The dissent complains that "in an effort to

reconstruct the trial from the bottom up and in hindsight, the majority goes to great lengths to marshal the evidence, vigorously arguing the facts and the inferences from those facts." Diss. at 6169. But because of the record-intensive nature of the inquiry required under *Harrington*, and because of the incomplete description of the evidence provided by the dissent, we have little choice but to describe the evidence in detail. We apologize to the reader in advance for the length of the discussion.

Three solicitations to murder were charged in Counts 1 through 3 of the indictment. In these counts, the government charged that Hinkson had solicited James Harding "in or about January 2003" to murder Cook (Count 1), Hines (Count 2) and Lodge (Count 3). The jury acquitted Hinkson on all three of these counts.

Three more solicitations were charged in Counts 4 through 6. In these counts, the government charged that Hinkson had solicited James Harding "on or about March 17, 2003" to murder Cook (Count 4), Hines (Count 5) and Lodge (Count 6). The jury deadlocked on these three counts.

Three more solicitations were charged in Counts 7 through 9. In these counts, the government charged that Hinkson had solicited Swisher "between about December 2002 and February 2003" to murder Cook (Count 7), Hines (Count 8) and Lodge (Count 9). The jury returned a verdict of guilty on these counts.

Finally, two threats to commit murder were charged in Counts 10 and 11. In these counts, the government charged that Hinkson made statements to Anne Bates in which he threatened to murder the children of Cook (Count 10) and the children of Hines (Count 11). The jury acquitted Hinkson on these counts.

The issue at trial was not whether Hinkson asked various people to kill Cook, Hines and Lodge. The evidence was persuasive that he had done so. The issue was whether Hinkson had been serious. That is, the issue was whether he had an actual "intent" that Cook, Hines and Lodge be killed. 18 U.S.C. § 373(a). Only if Hinkson had been serious in soliciting the murder of Cook, Hines and Lodge had he committed a criminal offense.

The jury acquitted Hinkson outright on three of the nine counts charging solicitation in violation of § 373(a). On these three counts, the jury concluded that the government had not shown that Hinkson had been serious in soliciting murder on that occasion. The jury could not make up its mind on three more of the counts, unable to conclude unanimously that Hinkson had been serious in soliciting murder on that occasion. The jury was able to conclude unanimously only on three counts – Counts 7-9, the counts involving Swisher – that Hinkson had been serious in soliciting murder. In order to assess the likelihood of an acquittal on retrial on the three Swisher-related counts (Counts 7-9), it is useful to examine

the evidence on which Hinkson was acquitted on the three Harding-related counts (Counts 1-3).

More than half of the trial testimony provided background evidence for all of the counts charged in the indictment. This background evidence showed that Hinkson owned and operated a lucrative business called WaterOz in Grangeville, a small town in Idaho. WaterOz bottled water into which had been dissolved, by a secret process invented by Hinkson, very small particles of minerals such as gold and platinum. According to Hinkson, the water has marvelous medicinal properties. He advertised and sold the water over the Internet.

Hinkson did not pay federal income tax, on the asserted ground that he was not legally obligated to do so. (In a separate appeal, we affirm today Hinkson's criminal conviction on his tax and currency structuring offenses.) Hinkson was unstable and paranoid. Hinkson was continually worried that people, including government officials and his own employees, were trying to take WaterOz from him. After Cook and Hines participated in an early-morning raid of his home in November 2002, Hinkson repeatedly claimed that they had tried to murder him. Hinkson also repeatedly claimed that an attorney named Dennis Albers, who previously had represented a plaintiff in a successful suit against him, was trying to murder him.

Hinkson developed grudges easily and held them tenaciously. He had a special dislike for employees of

the federal government. Sometimes his talk was somewhat comical. For example, he talked to James Harding about a "fed-a-pult" and a "fed-guard." According to Harding, a "fed-a-pult" was a device to catapult federal agents into a canyon or into an oncoming train. A "fed-guard" was something to put "on the front of your car like a cattle guard." Sometimes his talk was not comical at all. For example, the evidence at trial showed that Hinkson asked multiple people, on multiple occasions, to kill Cook, Hines and Lodge, and that Hinkson repeatedly said he wanted to torture and kill people, including the children of Cook and Hines.

1. Evidence Supporting Counts 1-3

Counts 1 through 3 charged that in January 2003 Hinkson solicited James Harding to kill Cook, Hines and Lodge. As noted above, the jury acquitted Hinkson on these counts.

The evidence supporting Counts 1 through 3 was as follows. In November or December 2002, Harding and Anne Bates met Hinkson at a "health forum" in Southern California. At that time, Harding was a restaurant manager in Southern California. Previously Harding had been a bodyguard and had worked "in the entertainment field." He had most recently "hosted" radio shows on "the paranormal"; before that his radio work was [sic] had been "comedy shows, morning shows, afternoon drive, entertainment." His last radio work was three years before he testified.

After the "health forum," Hinkson, Harding, Bates and several others went out to eat. During the meal, Hinkson offered Bates a job at WaterOz. Harding and Bates drove to Grangeville at the beginning of January 2003 and stayed at Hinkson's house.

On the second night of Harding and Bates's stay, Harding was sitting at the kitchen table. Bates was nearby. Harding testified that Hinkson handed him "a large sum of money." Harding responded with a crude joke: "Who do I have to blow?" According to Harding, Hinkson responded "something like, 'It's not who you have to blow but who you have to kill.'" Harding testified, "I could make this much money killing [Cook, Hines and Lodge]. He had also a wad with him of some sort; and that was supposed to be another $10,000. There was a $10,000 flat fee, and this was a wad of $10,000." Harding testified that Hinkson then "pulled back . . . and it became a joke." But, Harding testified, "I assumed that I was being tested." He testified further, "And when the $10,000 came up, I thought this was his test."

Bates, who was also in the kitchen, testified about the episode. "We were at the table in the kitchen. . . . He was saying something along the lines that he would like some of these people dead, and he had a lot of money that he produced from somewhere. And I don't know if – maybe in a joking manner, he offered it to J.C. [*i.e.*, Harding] and said, you know, 'Whoever does this, this is theirs,' something along those lines from what I can remember." The

prosecutor asked: "Did he say it was a joke?" She answered, "He did not say it was a joke, no."

Bates remained in Hinkson's house in Grangeville, but Harding went back to Southern California to bring Bates's things back in a U-Haul. On Harding's return he again stayed in Hinkson's house, "probably" during the second week of January. Harding testified as follows:

> Q. Did you have any further discussions with Mr. Hinkson where he talked about these three feds, federal officials?
>
> A. Every time I talked to Dave. That was on his mind every time when we talked on every occasion.
>
> Q. Did that happen on the second occasion?
>
> A. Absolutely, yes. . . .
>
> Q. What did he say?
>
> A. That they need to die; they are demons; they need to be tortured. It was sick stuff that I don't like coming out of my mouth. . . . I hate them; they are demons; they need to die; they need to be killed; I have got people working on that. You never know if he is kidding or serious. I want their throats cut; I want them tortured; I want them taken out and shot in the knee caps and told who is having it done and why it's being done.
>
> . . .

> Q. Did he say how he wanted Agent Hines killed or harmed?
>
> . . .
>
> A. No. The second visit . . . it wasn't specific. It was just malicious rhetoric, like I'm saying. He would be killed, executed. Dave becomes a madman when he talks about it. He will, literally, get very angry. It's anything you can think of that is wild. It grew and grew each time.

During this second visit, Hinkson asked Harding to get ammunition for guns that Hinkson kept in the house. Harding testified that while Hinkson did not seem to know much about guns, he was very interested in what Harding knew about them: "[W]e talked about my knowledge of guns and that I grew up around guns and shotguns. He wanted to know how extensive my background was, the basics of how I got into it and why I was into it." Harding testified that he had worked as a bodyguard, and that Hinkson knew him through a friend who was also a bodyguard:

> Q. How do you know he knew you through another bodyguard?
>
> A. They were good friends. They were close friends.
>
> Q. Who is that?
>
> A. Mark Glover. . . . Him and David – I don't know how – are very close friends. And

I know Mark through doing security work, bodyguarding.

. . .

Q. Have you worked as a bodyguard?

A. Yes.

Q. Have you worked with Mr. Glover?

A. Yes.

Harding became very friendly with Hinkson and frequently stayed at his house in Grangeville on the weekends. During those visits, Hinkson repeatedly discussed killing Cook, Hines and Lodge.

Q. On the occasions that you go back up to Grangeville, would you see Mr. Hinkson?

A. Yes.

Q. Would you talk to him on the same subject matters of the three federal officers?

A. Extensively.

Q. Did he mention these things about killing federal officers more than once?

A. Every time we spoke, yes.

Q. How many times?

A. Fifty. . . .

Q. Did there come a time when he also offered you money?

A. Yes.

Q. In relationship to when you first came to Grangeville, that first trip in early January, when would be the second time he offered you money?

A. A couple of weeks, maybe.

The second time Hinkson offered Harding money, the two men were driving to the bank. Harding testified that Hinkson had $10,000 with him.

Q. What did he say . . . ?

A. Just leading. You could use the cash. Do you need cash? Do you need money. You could use this extra money. Think about it. I never knew if he was serious or kidding. He always talked about it and said it; and it was always leading, like I was supposed to bite.

Harding eventually became convinced that Hinkson had been serious in soliciting him to kill Cook, Hines and Lodge. When Hinkson solicited him again in March of 2003, Harding contacted the F.B.I. He spoke to Nancy Cook, telling her, "Somebody is going to make an attempt on your life, I believe, if I don't make this phone call." The F.B.I. arranged for Harding to go back to Hinkson's house with a recording device concealed on his body. Possibly because Hinkson suspected the existence of the device, Hinkson said nothing incriminating on that occasion.

2. Evidence Supporting Counts 7 through 9

Counts 7 through 9 charged that between December 2002 and February 2003, Hinkson solicited Swisher to kill Cook, Hines and Lodge. As noted above, the jury convicted Hinkson on these counts.

We have already described much of the evidence supporting Counts 7 through 9. We recount it here in more detail to facilitate a meaningful comparison to the evidence supporting Counts 1 through 3. Swisher took the stand wearing a Purple Heart pin on his lapel. On direct, he was folksy and garrulous:

Q. Mr. Swisher, how old of a man are you?

A. I turned 68 yesterday.

Q. You live in Idaho?

A. Yes, I do.

Q. For how long?

A. My gosh. Over thirty years.

. . .

Q. How did you have an interest in mining?

A. Well, I have an old friend, who is now dead – bless his soul – and he was one of the – he was the epitome of an Idaho range rider till the day he died. He carried an old, single-action Colt .45 and rode the range in the back country.

Q. My question is: How did you manage to switch careers [to mining]?

A. I'm getting to that, counselor.

Swisher testified that he had expertise in "assaying," and testified at some length about his work for WaterOz testing the concentration of minerals dissolved in the water. Then the prosecutor asked him about his military background, and Hinkson's interest in that background:

Q. Have you ever served in the Armed Forces, Mr. Swisher?

A. Yes.

Q. Did Mr. Hinkson ever ask you about your service in the Armed Forces?

A. Yes.

Q. What branch did you serve in?

A. United States Marine Corps.

Q. Did you ever discuss that with Mr. Hinkson?

A. Yes.

Q. And what was the nature of your discussion with him?

A. As I recall, Mr. Hinkson stated he had been in the Navy. I indicated I had been in the Marine Corps. He asked if I had served in any combat situations. I . . . told him, "Yes."

Q. What else did he ask you about combat situations?

A. He asked if I had ever killed anyone.

Q. What did you say?

A. I told him, "Yes." He asked, "How many?" And I told him, "Too many."

Q. Was that one conversation or several?

A. It may have happened over a period of time.

Q. What period of time?

A. Oh, probably off and on throughout the year 2001.

Swisher testified that Hinkson knew that he was expert with firearms:

Q. Did you ever claim to Mr. Hinkson that you had proficiency with firearms?

A. I believe he knew that I was an expert rifleman, pistolman.

Q. How did he know that?

. . .

A. I probably told him, and he observed my shooting.

Q. What was the occasion that you went shooting with him?

A. I believe it was probably in December, sometime in December of 2002, that he had a gentleman from . . . Ukraine, visiting. . . . He said we were going to meet out at an employee's who lived in the country, Mr. Rich

Bellon. . . . [W]e shot during the course of the day.

Q. Who did?

A. Myself, Mr. Hinkson, and the Russian gentleman.

. . .

Q. What did you bring?

A. I brought a .22 Henry lever-action rifle and .32 semi-automatic Browning pistol, and a .45 auto.

Q. How was your shooting?

A. I always hit what I aim at.

Q. How was Mr. Hinkson's shooting?

A. Not terribly good.

Q. What were you shooting at?

A. Well, we shot some trap with a shotgun. I only shot maybe a half dozen times because I recently had a pacemaker installed; and a shotgun, a twelve-gauge particularly, kind of jars you around a little. I decided I would quit in due time, but I hit my targets. As I recall, I don't believe David hit any of his.

Swisher described their "trap shooting" as follows:

The person who wasn't shooting would throw the clay pigeons for the others. You have a spring-loaded hand unit that will kick them

> out, I expect, thirty, forty yards without any problem at all, airborne. . . . And the challenge is to hit the airborne target when it's across from you.

Swisher testified that Hinkson was very angry at Dennis Albers, whom Swisher also disliked. Swisher testified that sometime shortly after April 2002 Hinkson told him "in private" that he wanted Albers and his family members tortured and killed:

> Q. What was it that Mr. Hinkson said?
>
> A. Well, he started off by talking about how he would like to have Mr. Albers and his family, particularly his wife, Margaret, tortured and killed. And he went into quite a description of the torture.
>
> Q. And what was that?
>
> A. He would – he said he would like to see them stripped, bound, and gagged, and then burned with cigarettes or cigars. And then while Albers was down on his knees observing this occurring to his wife and any other family members that might be present, he wanted to have a plastic bag put over her head so that she would suffocate to death in front of him, along with the other family members. Then he wanted that procedure repeated on Mr. Albers, himself.
>
> Q. Did he want you to do something in that regard?

A. When he finished describing what he wanted done, then he offered me $10,000 a head to do it.

Q. What was his demeanor like when he was telling you these things?

A. He was cool and calm at that time.

Q. What was your response to Mr. Hinkson?

A. I told him he was out of his mind and he needed to knock that kind of BS off, and I didn't even think about it.

Q. How did he respond to that?

A. He just smiled and then didn't reply and changed the subject.

Swisher testified that he had a further conversation "in Hinkson's trailer" in July or August of 2002:

Q. What did Mr. Hinkson say about how he felt about Nancy Cook and Steve Hines?

A. He wanted them treated in the same fashion as he had initially described for Mr. Albers and his family. . . . [H]e asked if I remembered the offer he made regarding Mr. Albers and his family. And I said that, of course, I did. And he said he wanted that done, basically, with Ms. Cook and her family and Mr. Hines and his family. And I told him, again, that he was out of his mind. And I, also, went into a little bit of a dissertation because David was a friend at that time. And he said, "Well, you know, I know you're used

> to it. I mean, you have killed people." I said, "Yes, I have killed people in defense of my life and others; but what you are talking about is murder, and there is a significant difference here. And you need to get it out of your head because, if you continue talking that way, it will get you in trouble. And if you continue talking this way and I think you are serious about this, I will have to report it to the authorities."
>
> Q. How did he respond to that?
>
> A. Well, he got his smile again; and then he changed the subject[.]

Swisher testified that after Cook and Hines arrested Hinkson in a raid on his house in November 2002, his hostility toward them intensified. Swisher testified, further, that Hinkson had a third conversation in which Judge Lodge was added to the list of intended victims:

> A. [I]n January of '03, he approached me again[,] went through the names of the people that had offended him, and added a federal judge by the name of Lodge to that list. And I, essentially, dropped the hammer at that point on David.
>
> Q. Let me first ask what he asked you to do regarding those people?
>
> A. He wanted them all treated the way that the initial offer regarding Albers and his family had been handled.

Q. Were you to receive anything in return for doing that?

A. At least $10,000 a head. And I made a mental note that, with all of the people he named at that time, we were well over $100,000.

. . .

Q. Did the $10,000 offer include Nancy Cook and Steve Hines?

A. Oh, yes.

Q. Did it include Mr. Albers?

A. Yes.

Q. Did it include the children of those people?

A. Yes.

Q. What did he want done with the children of those people?

A. Treated in the same fashion.

Q. How?

A. Tortured and killed.

Q. Now, you mentioned, this time, you reacted in a different fashion?

A. Yes, I did. I'm afraid I became a bit hostile, myself, at that point in time.

Q. What did you say?

. . .

A. I told him, regarding these matters of trying to kill people or having me murder them for him and so on, that I never wanted to hear that again and to fuck off. And he left.

Q. What was his demeanor like when he was asking you to do this?

A. He was almost in a pleading fashion that last time. He was telling me how harassed he had been and how they had hurt him and they were out to not just get him but to kill him, too, and he just had to have this done; and as his best friend, as he put it at that time, he felt I should do it.

Swisher testified that sometime in the spring or summer of 2003, he finally contacted a law enforcement official. However, he was unsure about the date on which he did so, and he was unforthcoming about the details of what he told law enforcement officials:

Q. . . . When did you contact anyone in legal authority regarding Mr. Hinkson?

A. Oh, I think it was probably just before he was re-arrested in '03. I'm not quite sure of the date there.

Q. Are you talking about spring or summer '03 or what?

A. No. It would have probably been getting close to summer there. Spring, summer, somewhere through there. Sometime after April, I'm thinking.

Q. All right.

A. I might be wrong.

Q. And who did you contact?

A. I contacted the Idaho County Assistant Prosecutor from Grangeville.

Q. Now, is he a State Prosecutor, as opposed to a Federal Prosecutor?

A. Yes. That's correct.

Q. And did you express some concern to him?

A. I did.

Q. Was it regarding Mr. Hinkson?

A. Yes.

Q. Thereafter, were you contacted by the FBI?

A. Yes.

Q. Who contacted you?

A. Mr. Will Long.

Q. That's the person here at the table?

A. Correct, sitting right there.

THE COURT: For the record, the witness has identified Special Agent Long.

[THE PROSECUTOR]: Thank you, Your Honor. I have no further questions on direct, Your Honor.

The government's direct examination of Swisher filled forty-three pages of transcript. Cross examination, not including Swisher's testimony about the Purple Heart and "replacement DD-214," filled eighty-three pages. During this cross examination, Swisher made clear that on the three occasions when Hinkson solicited him to kill Albers, Cook, Hines and Lodge, there were no witnesses: "When he made the three direct solicitations to me, they were made in private."

Much of the cross examination was devoted to showing the extreme hostility between Swisher and Hinkson. This extreme hostility had arisen after Hinkson's supposed solicitations of Swisher to commit murder, and it had arisen for reasons that were unrelated to the solicitations. Richard Bellon was one of Hinkson's key employees at WaterOz; indeed, the trap shooting had taken place at Bellon's house. Sometime in late 2003, Bellon sued Hinkson for ownership, or partial ownership, of WaterOz. In response, Hinkson brought Swisher into the suit, apparently as a third-party defendant. Swisher then counter-claimed against Hinkson for more than $500,000.

Relations between Swisher and Hinkson became so strained that Swisher accused Hinkson of hiring someone to kill him. Swisher testified that he was "at a remote area in Idaho County with a Vietnam combat veteran friend." Swisher was sitting in an outhouse when, according to his testimony, someone hired by Hinkson shot at him and missed. However,

Swisher admitted that he never saw the person who supposedly did the shooting, and that no shell casings or footprints were ever found.

Only one witness corroborated Swisher's testimony that Hinkson had been interested in, and impressed by, Swisher's military background. That witness was Richard Bellon. Bellon testified that Hinkson "wanted to hire Joe Swisher as a bodyguard." "[H]e felt like he needed to hire [Swisher] because he was trained":

> Q. Did [Hinkson] explain to you how Mr. Swisher was trained?
>
> A. Yes. . . . [I]t was that Mr. Swisher had an extensive military background, that he had been in combat, and that he had killed people during the war. Mr. Hinkson would tell me about that and the details of him, his past.

In his own testimony, Swisher never mentioned that Hinkson had wanted to hire him as a bodyguard. Nor did Swisher ever mention that Hinkson had been interested in his military background because of a desire to hire a bodyguard.

Hinkson took the stand in his own defense. Swisher had already testified that on three occasions Hinkson had solicited him "in private" to commit murder. Hinkson specifically denied having made such solicitations:

> Q. Mr. Hinkson, Mr. Swisher indicated that he had been solicited by you on a number of

occasions[.] . . . Do you recall that he said that in his testimony?

A. . . . . Yeah.

Q. Mr. Hinkson, did you ever have a communication with Mr. Swisher where you asked him to murder anyone?

A. No, sir.

Hinkson had a somewhat different recollection of the excursion to Bellon's house. According to Swisher, they had engaged in trap shooting "during the course of the day." Swisher testified, "I hit my targets." Hinkson testified:

Q. Do you remember the evening that Mr. Swisher went to Mr. Bellon's house with you for dinner?

A. Yes, I do.

Q. And I believe there was testimony that that occurred in approximately September of '02?

A. Yes, just before his open heart surgery.

. . .

Q. And there was someone who came to dinner that night? Who was that?

A. Roman Polankio from the Ukraine.

. . .

Q. Who fired the gun that evening?

> A. I'm not really interested in guns, and I shot it twice. Mostly, Joe [Swisher] shot from his chair because he had a hard time standing. He was pretty sick.

Bellon, at whose home the trap shooting took place, was called by the government to testify. The government did not ask Bellon whether it was true that Swisher was then "pretty sick" with heart disease; that Swisher shot "mostly . . . from his chair"; or that Swisher successfully hit all of his targets. Those targets, according to Swisher's testimony, had been rapidly moving airborne clay pigeons thirty to forty yards away.

3. Comparison of the Evidence in Counts 1 through 3 and Counts 7 through 9

The background evidence against Hinkson was the same for both Counts 1 through 3 (the Harding-related counts on which he was acquitted) and Counts 7 through 9 (the Swisher-related counts on which he was convicted). It was relevant to all of these counts that Hinkson had a paranoid unstable personality; that he disliked government interference with his affairs; that he particularly disliked Cook, Hines and Lodge; and that he had asked multiple people on multiple occasions, not limited to Holding and Swisher, to kill Cook, Hines and Lodge on his behalf.

The evidence specific to Counts 1 through 3 and Counts 7 through 9 is similar in a number of respects.

First, there was evidence that Hinkson believed that both Harding and Swisher were skilled in the use of firearms. Second, there was evidence that Hinkson knew that Harding had been a bodyguard, and that he was interested in using Swisher as a bodyguard. Indeed, Bellon testified that Hinkson's interest in Swisher's military background and skill in firearms stemmed from his interest in using Swisher as a bodyguard. Third, the charged solicitations took place at about the same time. Counts 1 through 3 involved conduct that supposedly took place in January 2003. Counts 7 through 9 involved conduct that supposedly took place between December 2002 and February 2003.

The evidence specific to these counts differed in some respects. However, three of those differences made it more likely that the jury would have convicted on the Harding-related counts rather than on the Swisher-related counts.

First, there was a corroborating witness to one of the charged solicitations of Harding. Bates was a witness to the solicitation in Hinkson's kitchen at the beginning of January. She testified that she saw the "wad" of money on the kitchen table and that she heard Hinkson tell Harding that the money was his if he killed Cook, Hines and Lodge. Bates testified that Hinkson had not said that we [sic] was joking when he said this. By contrast, Swisher testified that there were no witnesses to any of Hinkson's three solicitations. He specifically testified that all three solicitations took place "in private."

Second, Harding and Hinkson were good friends at the time of the solicitations. They became unfriendly only as a result of Harding's reporting to the F.B.I. that Hinkson had solicited him to commit murder. Swisher and Hinkson also had been good friends at the time of the solicitations. But, by contrast to Harding, Swisher had become a bitter enemy, for reasons unrelated to the solicitations, by the time of trial. Thus, unlike Harding, Swisher had ample reason, unrelated to the solicitations, to wish Hinkson ill when he testified at trial.

Third, Harding testified that Hinkson first solicited him in January 2003 to murder Cook, Hines and Lodge. He testified that Hinkson solicited him again in March 2003. Immediately after the March solicitation, Harding contacted the F.B.I. In an effort to help the F.B.I., Harding went so far as to wear a secret recording device in an attempt to obtain incriminating evidence against Hinkson. By contrast, Swisher testified that Hinkson solicited him shortly after April 2002 to murder Albers. Swisher testified further that Hinkson solicited him in July or August 2002 to murder Cook and Hines. Finally, Swisher testified that Hinkson solicited him in November 2002 to murder Cook, Hines and Lodge. Swisher testified that he did not go to a local Idaho prosecutor to report Hinkson's solicitations until sometime after April 2003.

Harding was so concerned about Hinkson that he went to the F.B.I. within two months of the time Hinkson first solicited him, and immediately after the

second time. When Harding contacted the F.B.I., he and Hinkson were still on good terms. Harding testified that he spoke directly to Nancy Cook, one of Hinkson's would-be victims, and told her that he thought she was in danger. Harding then wore a wire at the request of the F.B.I. in an attempt to obtain evidence against someone he clearly thought was dangerous. By contrast, Swisher waited at least a year after Hinkson solicited him to murder Albers, at least nine or ten months after Hinkson solicited him to murder Cook and Hines, and at least three or four months after Hinkson solicited him to murder Cook, Hines and Lodge. Unlike Harding, Swisher called a local Idaho prosecutor rather than the F.B.I., even though federal officers had been threatened, and, unlike Harding, Swisher gave no specifics about what he told law enforcement officials. When Swisher finally contacted the local prosecutor, he and Hinkson were no longer on good terms. There is nothing in the record to indicate that Swisher ever offered to wear a wire or otherwise to help gather incriminating evidence against Hinkson.

In three respects the evidence against Hinkson was stronger in the Swisher-related counts than in the Harding-related counts.

First, Swisher testified that Hinkson believed him to be particularly well qualified to be a killer. Swisher testified that he told Hinkson about his combat experience in Korea, and that he had killed "too many" people. We now know that story to be false. However, there is evidence from both Swisher

and Bellon that Hinkson believed the story. Swisher's (falsely claimed) combat experience could well have made a greater impression on Hinkson than Harding's experience with firearms and his work as a bodyguard. There was a great deal of evidence at trial – most of it from Swisher himself – about Swisher's ill-health. But the jury could have concluded that despite Swisher's ill-health, Hinkson could have seen him as a well qualified killer.

Swisher further testified that while trap shooting he had demonstrated to Hinkson that he was an excellent shot. The jury might have had some reason to doubt Swisher's story about hitting all of his targets, given that Hinkson described Swisher as a very sick man who sat in a chair while shooting. But the jury could well have disbelieved Hinkson, and could have believed that Swisher had indeed demonstrated to Hinkson on that occasion that he was an excellent shot. The jury could have concluded that an actual demonstration of shooting prowess by Swisher was more impressive to Hinkson than Harding's mere talk about his knowledge of guns.

Second, Swisher testified that during the first solicitation Hinkson's "demeanor" had been "calm and cool," and that during the third solicitation Hinkson's "demeanor" was "almost in a pleading fashion." By contrast, Harding testified that he had difficulty telling whether Hinkson was serious in soliciting the murders. Only after a second solicitation in March did Harding decide that Hinkson had been serious.

Third, Swisher presented himself as a United States Marine who had been wounded in the service of his country. His status as a decorated war hero may have been, for some or all of the jurors, an additional reason to believe his testimony. The jury may have found Swisher particularly credible and sympathetic when, after an accusation by Hinkson's counsel that Swisher was lying about his military record, Swisher dramatically produced his "replacement DD-214" from his pocket. The jury might also, despite the district court's instruction, have penalized the defense for what appeared to be an unfounded attack on a decorated war hero.

However, our task is not to replay the first trial except as it might help us predict what would happen if Hinkson is retried on Counts 7 through 9. The question before us is what would happen at a new trial. Specifically, the question is whether the fifth *Harrington* requirement is satisfied: Does the new evidence "indicate that a new trial would probably result in acquittal"?

In the original trial, Swisher was the only witness to provide direct evidence that Hinkson solicited him to commit the killings. On retrial, the government would have no choice but to rely on Swisher to supply the evidence of Hinkson's solicitations. To say that Swisher's credibility would fare poorly at a new trial is an understatement. At Hinkson's original trial, the jurors almost certainly had the impression that Swisher was a decorated combat veteran. The prosecutor described Swisher in his opening

statement as a "Combat Veteran from Korea during the Korean Conflict" who "was not averse to . . . violent, dangerous activity," and stated in his closing argument that Hinkson "understood" that Swisher "had served in combat and killed people." In response to defense counsel's questions, Swisher produced his "replacement DD-214" on the witness stand and testified that he had seen combat in Korea and earned a Purple Heart. Defense counsel asked the district court to instruct the jury to disregard that testimony stricken because he feared that the jury might penalize the defense for wrongly assailing a war hero. Although the court granted defense counsel's request, the court's instruction to the jury referred to Swisher's lapel pin as a "Purple Heart Medal" and a "military commendation."

Defense counsel's efforts to impeach Swisher at the original trial focused on the fact that Swisher and Hinkson, who were once friends, were now bitter enemies who had sued and counter-sued each other. On retrial, impeachment of Swisher would not be so limited. The parties now know conclusively, based on the Miller and Woodring affidavits, that Swisher forged his "replacement DD-214" and his purported "supporting letter" from Colonel Woodring, and that he used these forged documents in an effort to obtain veterans' benefits. The parties also now know conclusively that Swisher never served in combat or earned any personal military commendations, and that he was not injured in battle overseas but in a private automobile accident near Port Townsend,

Washington. And they now know conclusively that Swisher lied under oath about participating in secret combat missions in North Korea, about being wounded in action, and about receiving a Purple Heart.

At a new trial, the government could put Swisher on the stand to testify, as he did at the original trial, that he told Hinkson that he was a decorated Korean War veteran who had killed "too many" people. The government could then argue that Hinkson, believing these things, seriously solicited Swisher to kill three government officials. But this time, on retrial, defense counsel and the government would know the truth.

Defense counsel would impeach Swisher by asking if it was true that he was not in fact a Korean War veteran; that he had in fact not won a Purple Heart or other awards; that he had not in fact been injured in combat in Korea but rather in a private automobile accident; and that in fact he had lied to the Idaho Division of Veterans Services about his injuries and non-existent medals in an attempt to get military benefits to which he was not entitled. That would already be bad enough, but it would get worse. Defense counsel would also ask Swisher whether, the last time he appeared in court to testify under oath against Hinkson, he wore a Purple Heart lapel pin to which he was not entitled, presented a forged "replacement DD-214," and otherwise lied about his military record. This time, defense counsel would not be left defenseless if Swisher were to choose to lie in

response to these questions because this time the government would also know the truth. If Swisher were to lie in response to any of the questions, the government would be obligated to correct the record. *See Napue*, 360 U.S. at 269; *Hayes*, 399 F.3d at 978.

In short, a new trial would be a disaster for the government. A new jury would not only learn, as the first jury did, that Swisher and Hinkson, once friends, had become bitter enemies by the time Swisher testified. It would also learn, as the first jury did not, that Swisher has no compunction about lying under oath to serve his ends, and that he had lied under oath and produced forged documents at Hinkson's first trial. We therefore conclude, under the fifth part of the *Harrington* test, that a new trial would probably result in acquittal.

F. Summary

Because Hinkson's motion met all five requirements of the *Harrington* test, we hold that he is entitled to a new trial on the Swisher-related counts of soliciting murder.

IV. Conclusion

We reverse the district court's denial of Hinkson's motion for a new trial. We do not reach Hinkson's other arguments. We remand to the district court to allow it to vacate Hinkson's conviction and sentence on Counts 7-9. Hinkson's conviction and ten-year

sentence on the tax and currency structuring charges are not affected by our decision.

REVERSED AND REMANDED.

McKEOWN, Circuit Judge, dissenting:

There is no honor in lying about one's military record. Indeed, Elven Joe Swisher joins a long line of luminaries accused of puffing and distorting their military service.[1] But a witness discredited on a collateral issue – his military service – is not grounds to reverse a murder-for-hire conviction that was corroborated by independent evidence, particularly when defense counsel had full opportunity to cross-examine the witness on that subject. The question in this case is whether David Hinkson solicited Swisher to murder a federal judge and other public officers, not whether Swisher lied about his military service. The district court determined that information about Swisher's military service was not "new" evidence, the prosecutor had no advance knowledge of this information, the defense was not diligent in pursuing this line of attack, and the defense was afforded ample opportunity to impeach Swisher.

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[1] *See* HENRY MARK HOLZER AND ERIKA HOLZER, FAKE WARRIORS: IDENTIFYING, EXPOSING AND PUNISHING THOSE WHO FALSIFY THEIR MILITARY SERVICE 15-21 (Xlibris 2003) (citing examples of a member of Congress, a prominent businessman and others who falsified military records).

In granting a new trial, the majority has assumed the role of a super trial court rather than a reviewing court. The bottom line is that nowhere does the majority give any deference to the district court's detailed findings. Instead, in an effort to reconstruct the trial from the bottom up and in hindsight, the majority goes to great lengths to marshal the evidence, vigorously arguing the facts and the inferences from those facts, and forgetting that "[u]nder the abuse of discretion standard, we cannot simply substitute our judgment for that of the district court[.]" *United States v. BNS Inc.*, 858 F.2d 456, 464 (9th Cir. 1988). I respectfully dissent because the district court did not abuse its discretion in declining to order a new trial.

Reading the majority's opinion leaves one with the impression that Swisher's lies were a focal point of Hinkson's trial, and that evidence of his misdeeds would play a pivotal role in a new trial. Nothing could be further from the truth. Placing the alleged "new" evidence in context underscores why impeachment evidence on such an attenuated and collateral issue does not merit a new trial and why the rules are geared to avoid a mini-trial on collateral issues. *See United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003) (rejecting evidence cited in support of new trial as "cumulative, impeachment-related, or both.").

THE EVIDENCE AT TRIAL

After a two-week trial, a jury convicted Hinkson on three counts charging that Hinkson sought to persuade Swisher to murder United States District Judge Edward Lodge, Assistant United States Attorney Nancy Cook, and IRS Special Agent Steven Hines. More than fifteen witnesses testified at Hinkson's trial, including Hinkson himself. At the conclusion of the trial, the jury was left with no doubt that Hinkson was enraged at the government for prosecuting him on tax and currency structuring charges, and that he believed that the government was colluding with others to destroy his business, WaterOz, a "miracle water" company. Proud of his company's success and deeply hostile towards anyone who challenged him, Hinkson was convinced that there was a "fairly long, lengthy list of people that were in the conspiracy to get him and take the company away from him."

The evidence at trial unequivocally demonstrated that Hinkson hated Lodge, Cook, and Hines, and his feelings for them were a matter of public knowledge. After the government began its tax investigation, Hinkson filed a civil rights suit against Cook, Hines, the IRS, and others, seeking $50 million in damages, the return of papers, and an injunction halting the investigation. When Hinkson was a guest on a radio show called the "Agitator Hour," he accused Cook of forging the grand jury foreperson's name on the indictment against him and the judge's name on a warrant authorizing the search of WaterOz. He

admitted at trial that he drafted an article entitled "David Hinkson's Day of Terror, at the Hands of Satan's Foot Soldiers" in which he claimed that Cook and Hines "orchestrated" a dramatic raid on his house "for the sole purpose of murdering me and ending the lawsuit that was filed against them by me in the amount of $50 million dollars." The evidence made crystal-clear that Hinkson, always "ranting and raving," was out to get those who, in his mind, were out to get him.

Hinkson knew Swisher well because Swisher, through an independent testing company, had performed chemical analysis of WaterOz products on an ongoing basis. Swisher testified that at one point in their relationship, Hinkson called him his best friend, and promised him twenty acres of land so that Swisher and his wife could live close to him. According to Swisher, after telling Hinkson that he had been in the Marine Corps, Hinkson asked him whether he had served in any combat missions. Swisher responded that he had. Hinkson allegedly then asked Swisher whether he had "ever killed anyone." Swisher answered that yes, he had. When Hinkson followed up with the question "how many?" Swisher responded, "Too many." Swisher also stated that he had discussed weapons and guns with Hinkson, and that Hinkson knew that he was an "expert rifleman [and] pistolman."

Critically, witness Richard Bellon corroborated in full Hinkson's belief in Swisher's military achievements. Bellon was a legal researcher who worked for

Hinkson in connection with the government's tax investigation. Bellon testified that Hinkson informed him that Swisher had "an extensive military background," had "been in combat," and had "killed people during the war." Hinkson also told him that Swisher was "licensed to carry a gun," and that Hinkson was interested in hiring Swisher as a bodyguard "because he was trained."

Hinkson also had first-hand knowledge of Swisher's familiarity with guns and his shooting prowess. In December 2002, Hinkson invited Swisher to go on a trap-shooting trip with a visitor from the Ukraine. In testimony that was not refuted at trial, Swisher stated that he brought his own cache of guns with him on the trip: a .22 Henry lever-action rifle, a .32 semi-automatic Browning pistol, and a .45 automatic. Swisher's shooting performance was very impressive: he apparently hit all six of the targets, while Hinkson hit none.

All of this evidence strongly supports the conclusion that Swisher's purported military achievements and gun expertise made him, in Hinkson's eyes, the perfect candidate to carry out a murder-for-hire plan. That Swisher in fact lied about his military record does not, in any way, alter the conclusion that Hinkson believed in his lies, and thought of him as capable of executing a hit. The issue at trial was not whether Swisher was a decorated veteran (he did in fact serve overseas in the Marines), but that Hinkson believed that Swisher had the military and combat experience necessary to carry out a contract hit. To be

sure, Swisher's puffed-up misrepresentations and misdeeds are shocking and offensive. But this collateral issue fails to undermine other evidence in the record demonstrating Hinkson's firm belief in Swisher's qualifications for the job.

The record supports a very plausible explanation for Swisher's lies: his desire to continue receiving benefits from the Veterans Administration under a fraudulent cover story that he also told his friend Hinkson. The great lengths that Swisher went to at trial to defend his military record – the bold lies, the convenient backstory, the forged document – make it more probable, not less, that Swisher convincingly puffed to his friend Hinkson, that Hinkson bought the story, and that Hinkson then solicited Swisher to kill the federal officials.

Other portions of Swisher's testimony, corroborated by Hinkson himself, supported these inferences. According to Swisher, Hinkson first asked him in April 2002 to torture and kill Dennis Albers, an attorney who had once won a large judgment against Hinkson on behalf of a former WaterOz employee. That Hinkson and Swisher both loathed Albers was no state secret. When Albers was running for public office in the fall of 2000, he started an "Unelect Dennis Albers Campaign." Hinkson also admitted that he had once said about Albers, "God needs to smite him" because "he was putting innocent people in jail." Swisher also had "bad feelings" towards Albers because he had prosecuted Swisher (unsuccessfully) twenty years before. Swisher acknowledged

at trial that he may have spoken with Hinkson about his hostile feelings for Albers, and possibly participated in Hinkson's campaign to "unelect" Albers.

According to Swisher, the first object of Hinkson's murder-for-hire scheme was their mutual enemy, Albers. But Swisher thought Hinkson was kidding, and he told Hinkson unequivocally to knock off talk like that. Only a few months later, Swisher [sic] again solicited Swisher, this time to kill Cook, Hines, and their families, but Swisher warned Hinkson that he would report him to the authorities if he brought it up again. By the third solicitation, Swisher knew that Hinkson was dead serious. At that point, Swisher reported the solicitation to an Idaho prosecutor and then the FBI was called in.

At trial, the defense hit Swisher hard on cross-examination and repeatedly attacked his credibility. In over eighty pages of cross-examination, Hinkson's attorneys explored Swisher's credibility with endless efforts to impeach him on different subjects: his bias ("[Hinkson] needs to discredit me in the worst way"); his deteriorating relationship with Hinkson (testifying about an attempt on his life and concluding that it must have been Hinkson because "no one else [] hates me bad enough"); his credibility (Swisher testified that he would consider killing someone for a half million dollars); and his previous legal involvement with Hinkson (Swisher admitted that Hinkson had sued him as a third party in an earlier Idaho state court civil action, and Swisher filed a cross-claim against him).

Swisher's testimony aside, other evidence presented at trial cemented the government's case against Hinkson. Witness after witness testified to Hinkson's express, intense desire that Hines, Cook, and Lodge be tortured and killed. Lonnie Birmingham, a WaterOz employee and close friend of Hinkson, testified that Hinkson had told him that he "wanted [Cook, Hines, and Lodge] killed" because "he felt like they were conspiring to come after him to destroy him." Bellon talked with Hinkson for hours on end about Hinkson's belief of a government conspiracy against him. Bellon described Hinkson's anger towards the officials prosecuting him as the "central focus of his life." After he violated the terms of his bond in the tax case, Hinkson told FBI Agent William Long during an interview that he hoped Cook, Hines, and Lodge would die, and that he had "vented about Judge Lodge, Nancy Cook, Steve Hines, and Dennis Albers." Long also disclosed that Hinkson admitted telling Harding that "if someone were to kill them [Cook, Hines, and Lodge], it would be worth $10,000 to me."

Harding's account of Hinkson's solicitations was almost identical to Swisher's account of his solicitations. Harding met Hinkson through a mutual friend in late 2002. Harding testified that in January 2003, Hinkson handed him a large wad of cash purported to be $10,000, and promised another $10,000, if Harding killed Lodge, Cook, and Hines. Anne Bates, a friend of Harding who was in the same room at the time of the alleged offer, corroborated this account. Over a

three-month period, Hinkson allegedly repeated his offer to Harding and raved that the officials' families, and then the officials themselves, should be tortured before they were murdered. According to Harding, Hinkson once stated that the officials should be murdered with "multiple shots and then a kill shot." Bates also stated that she overheard Hinkson say to a third party in 2003 that Hines and Cook "should watch their children be killed," and that Hinkson "wanted them dead."

The jury concluded that Hinkson solicited Swisher because the evidence compelled that verdict. The credible detail in Swisher's testimony, plus other evidence backed up by Hinkson's admissions and corroboration from third parties, including law enforcement, dispel any notion that Swisher's military service was a centerpiece or the linchpin of the trial.

Appellate Review of Denial of the Motion For New Trial

Our review of the denial of a motion for new trial is governed by the long-standing abuse of discretion standard. The defendant bears a "significant burden" to overcome this standard. *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989). According to our precedent, reversal under this standard is permissible only when we are firmly convinced that the district court committed a clear error in judgment. Put another way, reversal is justified only "when the appellate court is convinced firmly that the reviewed

decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000). To give texture to this standard, it is critical that we not only give deference to the district court but engage in some degree of self-reflection that we are true to our role as a reviewing court rather than as a trial court.

In assessing the exercise of discretion, the district court's denial of a new trial is benchmarked against the standards in *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005). *Harrington* sets out five criteria that the moving party must satisfy to warrant a new trial on the basis of new or newly discovered evidence: (1) the evidence is newly discovered; (2) the failure to discover the evidence sooner is not attributable to lack of diligence by the defendant; (3) the evidence is material to the issues at trial; (4) the evidence is neither cumulative nor merely impeaching; and (5) the evidence indicates that a new trial will probably result in an acquittal. *Id.* (citing *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991)). The majority's de novo conclusions that the district court was wrong in evaluating *every* *Harrington* factor is more than a stretch.

As a general matter, evidence that is "merely cumulative or impeaching" is not ordinarily "an adequate basis for the grant of a new trial." *Mesarosh v. United States*, 352 U.S. 1, 5 (1956). It is no leap to conclude that the prospect of impeachment on a collateral issue also does not warrant a new trial. Hinkson does not satisfy even the first two factors –

newly discovered evidence and diligence – nor does he meet the remaining criteria. Finally, it bears noting that the majority hints at government impropriety with respect to the production of evidence regarding Swisher's military record. Op. at 6111-12. Speculation on this point ignores the district court's explicit findings:[2]

> [T]he Government did not fail in its disclosure obligations. Furthermore, there is no factual link whatsoever between the government's conduct here and any alleged wrongful conduct on the part of witness Swisher. There is no indication that the Government had any awareness that any of Swisher's testimony regarding his military background could be false prior to defense counsel's mid-trial receipt of the surprise letter from the National Personnel Records Center.

I object to the majority's effort to override the district court record. If the district court's findings are clearly erroneous, then reversal on that point would be in order. Alternatively, if there remains a substantial question as to the timing and receipt of evidence regarding Swisher's military record, then the case

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[2] It is not our role to speculate about fax lines and timing of receipt of documents. In any event, after argument in this appeal, the government was asked to submit further documentation of the timing of its knowledge of the Dowling letter about Swisher's records. Nothing in that letter undermines the district court's findings.

should be remanded to the district court for further hearing and findings on that issue. But the worst of all worlds is to sprinkle the opinion with innuendo and then simply let it hang there as a backdrop to the remainder of the opinion.

1. Newly Discovered Evidence

The majority summarily discounts the newly discovered evidence factor in concluding that neither the Miller nor the Woodring affidavit were in the possession of the defense (or the government) until after the trial.[3] It goes without saying that neither affidavit was or could have been in the trial record, as they were not offered or procured until *after* the trial. But that superficial analysis begs the question. As the district court noted, "the substance of both proffered documents is not new[.]"

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[3] The majority also notes that Swisher has been convicted for the fraudulent wearing of a military decoration and the making of false statements to obtain veterans benefits. Op. at 6123-24. This information was not, of course, before the district court as part of Hinkson's new trial motion, and it would be inappropriate to permit this recent event to influence our evaluation of the district court's decision three years ago on the new trial motion. *See United States v. Boberg*, 565 F.2d 1059, 1062 (8th Cir. 1977) (declining to decide a new trial motion on the basis of new evidence where it had not been previously presented to the trial court). As the majority appears to acknowledge this point, one wonders the purpose of recitation of this after-the-fact information.

The Miller and Woodring affidavits added nothing of substance to the mix of information available to both sides before trial ended. The Miller affidavit essentially repeated information that had already been uncovered, e.g., that Swisher had not been awarded any military service awards, including a Purple Heart; that the replacement DD-214 did not exist in Swisher's official military file and was likely not authentic; and that his injuries stemmed from a vehicle accident, not from combat. The only matter of substance mentioned in the Woodring affidavit that the defense had not previously known is Woodring's declaration that his signature on the replacement DD-214 was forged. But this revelation barely makes a ripple in contrast to the information that was uncovered before trial ended. The record supports the district court's conclusion that nothing of significance offered by the defense in support of its new trial motion qualified as newly discovered evidence. Although the court had acknowledged at trial that the file was "very difficult to decipher," with the benefit of briefing and the entire record, it concluded that the "new" evidence offered by the defense was not newly discovered. That conclusion alone should end the new trial inquiry.

The sequence of events leading to Swisher's testimony about his military record is instructive on the first and second *Harrington* factors. On direct examination, Swisher testified that he told Hinkson that he served in the Marine Corps; that he discussed his military service with Hinkson; and that he told

Hinkson that he had killed "too many" people. After an extensive and withering cross-examination, defense counsel admitted in a side-bar colloquy that it had been digging into Swisher's military history and decided to cross-examine Swisher on that point. As the district court noted, defense counsel "opened the door on this," i.e., the subject of Swisher's military service.

At the close of its cross-examination of Swisher, defense counsel had in its possession the Tolbert letter, which stated that Swisher's record failed to show that he was ever awarded any personal decorations. With the court's permission, counsel reopened cross-examination to explore the military service issue. When that examination backfired and Swisher produced the replacement DD-214, there was extensive discussion between the court and counsel over how to proceed.

The district court was open-minded as to how to address the military commendation issue. Recognizing that defense counsel opened the door and that "ordinarily, under the rules, you are stuck with the witness' answer and the court has the discretion to restrict further collateral proof of that impeachment," the court nonetheless suggested that counsel could continue cross-examination. The court also stated that another option would be to instruct the jury to disregard the testimony relating to the Purple Heart. With the consent of defense counsel, the court ultimately finessed the situation by telling the jury that

the court had erred in permitting the inquiry and gave the following remedial instruction:

> [I]t's been a long day; and I now realize that I made a mistake in allowing the question with regard to the Purple Heart Medal. So I am going to instruct you to disregard completely all of Mr. Swisher's testimony with regard to that military commendation.

Although defense counsel marked the available documents as exhibits, they were neither offered, nor refused, as evidence. Nor did counsel attempt to procure an actual witness on the subject of Swisher's military history, although it could have done so before close of the trial. The defense did not request a short continuance or offer another remedial alternative to the court. In the end, defense counsel accepted the proposed instruction and made a deliberate choice not to reexamine Swisher a third time.

The majority excuses the defense's decision not to reopen cross-examination of Swisher because "[c]ounsel could hardly have anticipated that Swisher, after being shown the [Tolbert] letter, would pull from his pocket a forged document purporting to provide a superseding account of his military service." Op. at 6129. While Swisher's dramatic production of the letter was unexpected, counsel still had a number of options to impeach Swisher. Defense counsel's failure to prepare a backup plan in the event that Swisher did anything but wilt and confess his sins on the stand was a choice that it made.

Given the time available for the defense to investigate Swisher's record, and the juicy material that it could have culled from information available to it – ranging from the time of Swisher's service, to his signature on the original DD-214, to the fact that the replacement DD-214 was apparently not authentic – the defense had plenty of grist for the mill. The district court was flexible, and offered the reopening of cross-examination to explore these issues. Yet, the defense simply made the strategic decision not to go down that path.

2. Due diligence

Without deference to the district court's analysis, the majority concludes that "[i]n our view, defense counsel were diligent in looking for evidence that could be used to impeach Swisher." Op. at 6129. The majority's extensive discussion of this diligence nowhere cites to the district court's conclusion that Hinkson "is unable to establish that the failure to discover this evidence was not due to his counsel's lack of diligence" and that "the Court finds that defense counsel had ample time to investigate Swisher's record prior to trial, but was not diligent in pursuing the issue."

The district court's findings were not clearly erroneous. For starters, Hinkson's attorneys admitted at trial that they had been suspicious "[f]or quite sometime [sic]" about Swisher's military credentials because "of his age and because of the time of the

war." Three months prior to Hinkson's criminal trial on the solicitation charges, one of Hinkson's attorneys deposed Swisher as part of the multi-party Idaho state court lawsuit against Hinkson. At that time, Hinkson's lawyers were skeptical about Swisher's record. Swisher stated during this deposition that he was born January 13, 1937. As a matter of public record, the Korean conflict began in 1950 and fighting ended in 1953.[5] [sic] If Swisher had served in the "Korean War," as he had claimed, he would have been 13 to 16 years old at the time of his alleged service – certainly a red flag as to the possibility that he was not being truthful about his military record. At the same deposition, Swisher stated that he had constantly suffered from back pain because he had suffered two grenade injuries while he was in the military. He made these same claims in two grand jury appearances in 2002 and 2004, which led to Hinkson's indictments. The defense received those transcripts a week before trial. Defense counsel admitted that he knew, based on Hinkson's prior testimony before the grand juries, that "I should be very careful in my cross-examination of him."

All of these facts were on the table and subject to investigation *before* the trial began and certainly before trial ended. Even during trial, once more facts came to light, counsel could have subpoenaed

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[5] Encyclopedia Britannica Online, Korean War, http://www.britannica.com/eb/article-9046072/Korean-War (last visited May 16, 2008).

witnesses on this subject. But it chose not to, a strategic decision that cannot now be the basis of the grant of a new trial motion. The district court had first-hand experience with the discovery chronology and the diligence of defense counsel. Nothing supports the majority's rejection of the district court's explicit findings regarding lack of diligence.

3. Materiality

The next question for consideration under *Harrington* is whether the evidence about Swisher's military record was material to the issues at trial. The district court held that the "proffered 'new' evidence is not material to the issue at trial[.]"

I cannot think of a clearer example of a collateral issue than Swisher's military service.[5] "Ordinarily, evidence impeaching a witness will not be material . . . because it will not refute an essential element of the government's case." *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 2005) (citations omitted). Evidence that Swisher allegedly lied during the course of Hinkson's past trial will not refute an essential element of the government's solicitation case against Hinkson at a new trial nor would the

[5] Contrary to the majority's characterization, materiality is not coextensive with the fifth *Harrington* factor of whether acquittal would be probable. *See United States v. George*, 420 F.3d 991, 1001 (9th Cir. 2005) (concluding that the newly discovered evidence was "not material[,]" as "[i]t would have only established a collateral point").

evidence be central to a new trial. The ultimate issue at a new trial is whether Hinkson solicited Swisher in the murder-for-hire scheme. Whether Hinkson was prompted to do so by his belief that Swisher had the qualifications to be an assassin is a related issue, although not one that depends on Swisher's actual military record. But Swisher's *actual* military record, and whether he was truthful about it, are collateral points. Ironically, Swisher's puffing of his military achievements makes it even more likely that Hinkson would have found him to be a suitable candidate. In any event, the veracity of Swisher's military record will not be material to the issues at a new trial and can only be described as a classic sideshow.

To be sure, Swisher is a key witness for the government, and his credibility is on the line. But the military service portion of his testimony was, relative to the rest of his testimony, unimportant. A district court "may well find it probable that an acquittal would result on retrial" when "the *bulk* of a key witness' testimony is otherwise shown to be false." *Krasny,* 607 F.2d at 845 (emphasis added). Swisher's testimony spanned over one hundred pages. Only three pages related to his Purple Heart and military service, and that portion was ultimately stricken from the jury's consideration. The "bulk" of his testimony has not been proven false. Thus, while *Davis* recognizes that impeachment evidence may be so powerful that "it could render the witness' testimony totally incredible[,]" 960 F.2d at 825, such is not the case here. Hinkson's perception of Swisher's purported

prowess and daring, not the truth of his military record, is the real issue.

The district court also held that while information about Swisher's record could be used for impeachment purposes, the documents and testimony by collateral witnesses would be inadmissible extrinsic evidence under Federal Rule of Evidence 608(b).[6] Rule 608(b) bars introduction of extrinsic evidence of a witness's past conduct. On cross-examination, the witness may be impeached by referencing documents and probing his veracity or "character for truthfulness or untruthfulness." *United States v. Abel*, 469 U.S. 45, 55 (1984). Nonetheless, Rule 608(b) "limits the inquiry to cross-examination of the witness . . . and *prohibits* the cross-examiner from introducing extrinsic evidence of the witness' past conduct." *Id.* at 55 (emphasis added). The district court also held that, on balance, the evidence was barred under Rule 403 because it would have "wasted considerable trial time on a confusing, tangential issue unrelated to the factual issues to be resolved by the jury." These evidentiary rulings also undermine the defense's claim that impeachment of Swisher's military record will blossom into substantive evidence at a new trial.

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[6] The majority's discussion of the wearing of the Purple Heart by Swisher seems misplaced. *See* Op. at 6133-34. That testimony was stricken, and there is little likelihood that this circumstance will be repeated at a new trial, such that the documents would be admissible as evidence to contradict a witness's statement.

4. Neither Cumulative Nor Merely Impeaching

The fourth factor for consideration is whether the alleged new evidence is "neither cumulative nor merely impeaching." The evidence here fails on both counts. As the district court concluded, the proferred "new" evidence was cumulative of other information that was already available to the defense prior to the conclusion of trial, such as the Tolbert letter and the Dowling letter. Those documents established, among other things, that the replacement DD-214 was a forgery and that Swisher had lied about receiving military awards. The "new" evidence, while more extensive, essentially confirms those facts.

The evidence is also plainly "merely impeaching," by any definition of the term. Evidence that Swisher lied with respect to his military record may affect the jury's estimation of his credibility on the stand. But its sole use at a new trial would be to impeach Swisher. Impeachment evidence that renders a witness's testimony totally incredible may be "material," within the meaning of the third *Harrington* factor, where the impeached witness's testimony was "uncorroborated and provided the only evidence of an essential element of the government's case." *Davis*, 960 F.2d at 825. But that circumstance does not describe the evidence here. To adopt the majority's view would require us to ignore all of the corroborating and circumstantial evidence pointing to Hinkson's guilt.

5. Probable Acquittal at a New Trial

The final consideration is whether the new evidence would probably result in Hinkson's acquittal at a new trial. The district court noted that the "Federal Rules of Evidence would not apply any differently in a new trial," such that "the proferred extrinsic evidence would . . . [not] probably result in an acquittal."

The "newly discovered" evidence fails this fifth prong of the *Harrington* test because it simply does not make an acquittal probable. The majority states that to convict Hinkson of solicitation, a jury at a new trial must believe that Hinkson "had been serious" in asking Swisher to kill Cook, Hines, and Lodge. Op. at 6143. The government has ample ammunition against Hinkson to establish beyond a reasonable doubt that Hinkson solicited Swisher. A new trial cannot erase the long, detailed history between Hinkson and Swisher. It will not change the undisputed testimony that Hinkson believed that Swisher, as a result of his military background and gun expertise, had the wherewithal to execute a hit. Nor will it erase the third party testimony that Hinkson wanted the three officials killed, that he hoped that they would die, and that to him, it would be worth at least $10,000 a head for that to happen. In short, nothing in the record suggests that the district court abused its discretion in concluding that a new trial would probably not result in Hinkson's acquittal.

The majority suggests that the evidentiary deck was equally stacked against Hinkson on the Swisher-related counts as on the Harding-related counts, implying that Swisher's tales of military awards and combat injuries might have swayed the jury to convict Hinkson only on the Swisher-related counts.[7] But the effort to construct perfect parallels between Swisher and Harding is too simplistic. There were myriad reasons other than those listed by the majority that may have made Hinkson's guilt seem more solid to the jury on the Swisher counts. Unlike Swisher, who had known Hinkson for over two years and been a close friend at the time of the alleged solicitations, Hinkson had known Harding for only a few weeks before the first time that he allegedly asked Harding to kill three federal officials. Hinkson knew Swisher to be a vindictive person who, like Hinkson, acted on his dislike for those who had "wronged" him, like Albers. Hinkson had known Swisher through his regular consulting work for WaterOz, whereas Harding was a sometime radio show host who had recently worked on shows dealing with the paranormal. The fact that Hinkson *believed* Swisher to have significant combat experience was yet another

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[7] The majority writes that "Swisher presented himself as a United States Marine who had been wounded in service of his country" and was a "decorated war hero." Op. at 6165. But the district court instructed the jury to disregard all of the Purple Heart testimony, an instruction that we assume the jury followed. *See United States v. Jimenez Recio*, 371 F.3d 1093, 1101 n.6 (9th Cir. 2004).

reason that a solicitation to Swisher was both believable and a pragmatic choice. Swisher's lies simply enhanced his prowess from Hinkson's perspective. These distinctions illustrate that the Harding and Swisher solicitations cannot be neatly squared off, with evidence of Swisher's *actual* rather than *represented* military service tipping the scales at a new trial.

In reviewing the district court's denial of a new trial, we must be mindful of the factors articulated in *Harrington* and the deference accorded to the district court in making its discretionary ruling on a new trial. The district court provided a long and thoughtful recitation of his weighing of each of these factors. No legal error undermines that conclusion, and nothing in the district court's reasoning and conclusions was an abuse of discretion.

I respectfully dissent from the majority's decision to grant Hinkson a new trial. At most, I would remand for further factfinding on the issue of when the government knew, or should have known, of the Dowling letter. In doing so, if warranted by evidence of the government's knowledge, I would give the district court the first opportunity to evaluate a new trial motion under the *Zuno-Arce* test. *United States v. Zuno-Arce*, 339 F.3d 886 (9th Cir. 2003). Barring a majority for remand, I would affirm the denial of the motion for a new trial.

UNITED STATES DISTRICT COURT

District of Idaho

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	3:02-CR-00142-RCT
DAVID ROLAND HINKSON	Case Number: 1:04-CR-00127-RCT
	USM Number: 08795-023
	Curtis Smith, Steven Anderson Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 17 and 26 of the Indictment in Case #3:02-CR-00142-RCT

☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.

X was found guilty on count(s) 1-3, 4-16, 31, 33-38, 40-42 of the Indictment in Case #3:02-CR-00142-RCT and counts 7, 8 and 9 of the Superseding Indictment in Case #1:04-CR-00127-RCT after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
26 § 7203	Case #3:02-CR-00142-RCT. Willful Failure to File Tax Return	4/17/2000	1-3

26 § 7202	Case #3:02-CR-00142-RCT. Willful Failure to Collect Federal Taxes	11/1/2000	4-16
21 § 331(a)	Case #3:02-CR-00142-RCT. Misbranded Drug	1/22/2002	17
21 § 331(a)	Case #3:02-CR-00142-RCT. Adulterated Device	4/04/2002	26
31 §§ 5324(a)(3) & (c)(2) & 18 § 2	Case #3:02-CR-00142-RCT. Structuring Transactions to Avoid Reporting Requirements and Aiding and Abetting	2/23/2001	31, 33-38, 40-42
18 § 373	Case #1:04-CR-00127-RCT. Solicitation to Commit a Crime of Violence	February 2003	7
18 § 373	Case #1:04-CR-00127-RCT. Solicitation to Commit a Crime of Violence	February 2003	8
18 § 373	Case #1:04-CR-00127-RCT. Solicitation to Commit a Crime of Violence	February 2003	9

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 4,5,6,10 & #11 of the Superseding Indictment in Case #1:04-CR-00142-RCT. No verdict on counts 1,2 & #3 of the Indictment in Case #1:04-CR-00127-RCT.

X Count(s) 18,19,20.21,22, 23, 24, 25,27, 28,29,30, 32, and 39 in Case #3:02-CR-00142-RCT and counts 1, 2 & 3 in Case #1:04-CR-00127-RCT.

☐ is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 3, 2005
Date of Imposition of Judgment

Richard C. Tallman
Signature of Judge

Richard C. Tallman,
United States Circuit Judge
Name and Title of Judge

June 3, 2005
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 516 months. The total term in Case # 3:02-CR-00142-RCT consists of: terms of 12 months each on counts 1-3, 17 & 26; terms of 60 months each on counts 4-16; and terms of 120 months each on counts 31,33-38,40-42. All such terms in Case # 3:02-CR-00142-RCT shall be served concurrently with each other but consecutive to the imprisonment imposed in Case #1:04-CR-00127-RCT. The total term in Case #1:04-CR-00127-RCT consists of terms of 120 months each on counts 7, 8, and 9, which shall run consecutively to one another and consecutively to the criminal Case #3:02-CR-00142-RCT. An additional 36 months shall run consecutively to counts 7,8 and 9 pursuant to 18 U.S.C. § 3147. The total imprisonment term of 396 months imposed in Case #1:04-CR-00127-RCT shall not begin to run until the Defendant has completed service of the total imprisonment term of 120 months imposed in Case #3:02-CR-00142-RCT.

X The court makes the following recommendations to the Bureau of Prisons:

That the defendant be credited with all time served, from the date of his arrest on April 4, 2003; and that the defendant be initially classified as a high risk inmate who refuses to comply with institutional security rules, who poses a continuing danger to witnesses and Federal Officers, and who poses a risk of flight with access to money secreted in foreign bank accounts.

The defendant is to be placed in the maximum security facility at Florence, Colorado.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED
STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years.

a term of 1 year supervised release on counts 1-3, 17 & 26 in Case #3:02-CR-00142-RCT. 3 years supervised release on counts 4-16, 31, 33-38, 40-42 in Case #3:02-CR-00142-RCT. All such terms of supervised release to be served concurrently with one another. 3 years supervised release on counts 7, 8, and 9 in Case #1:04-CR-00127-RCT. All such terms of supervised release to be served concurrently with one another and concurrently with the three-year term of supervised release in Case #3:02-CR-00142-RCT.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

Because this judgment imposes a fine and restitution, it is a condition of supervised release that the defendant pay it in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with thestandard [sic] conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report withinthe [sic] first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics and shall permit the probation office to make such notification and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1) Defendant shall comply with the rules and regulations of the Probation Department.

2) Defendant shall not possess a firearm or other dangerous weapon.

3) Defendant shall provide the probation officer with access to any requested financial information.

4) Defendant shall not incur new credit charges or open additional lines of credit without the approval of

the probation officer unless the defendant is in compliance with the installment payment schedule.

5) Defendant shall submit to a search of his person, place of residence, or automobile at the direction of the U.S. Probation Officer and submit to seizure of any contraband found therein.

6) The defendant shall cooperate with the IRS in paying his back taxes owed. Also, he shall file any and all tax returns required by law and maintain compliance with all applicable tax laws and provide the probation officer with verification of his compliance.

7) Defendant shall participate in mental health counseling as directed by the U.S. Probation Officer. The costs of such treatment shall be paid by both the defendant and government based upon the defendant's ability to pay for treatment.

8) Defendant shall pay the special assessment, fine and the restitution obligation that is imposed by this judgment and any monies that remain unpaid at the commencement of the term of supervised release shall be made payable to the Clerk of the U.S. District Court, 550 W. Fort Street, MSC 039, Boise, Idaho, 83724. The defendant shall complete all financial payments no later than September 6, 2005.

9) Defendant, his agents, manager, officers, and responsible persons operating defendant's sole proprietorship under the name WaterOz, shall cooperate

with the Food and Drug Administration in maintaining and insuring compliance by WaterOz with all Food and Drug Act laws and regulations.

Special conditions of supervised release shall supersede any standard condition that is inconsistent with the special conditions.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 2,725.00	$ 100,000.00	$ 720.00

Special assessment $2,425.00 is imposed on Case #3:03-CR-00142-RCT.

Special assessment $300.00, Fine $100,000.00, Restitution $720.00 is imposed on Case #1:04-CR-00127-RCT.

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the

priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

The Court defers to the Internal Revenue Service Civil Division the collection of all back taxes, interest, and penalties owed by the defendant and his sole proprietorship Water Oz. Accordingly, the Court declines to order restitution of such losses in these criminal proceedings because the amounts owed are substantial and it would complicate and unduly prolong the sentencing process to fashion such an order where an alternative civil collection mechanism is readily available to the IRS. 18 U.S.C. § 3553(a)(1)(b)(ii).

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
Steven Hines		$720.00	100%
TOTALS	$_____	$ 720.00	

$_____

☐ Restitution amount ordered pursuant to plea agreement $_____

X The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have to ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $100,000 due immediately, balance due

X not later than September 6, 2005, or
☐ in accordance ☐ C, ☐ D, ☐ E, or
☐ F below; or

B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C. ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D. ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ☐ Payment during the term of supervised release will commence within _____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F. X Special instructions regarding the payment of criminal monetary penalties:

$2,725.00 special assessment and $720.00 restitution are due immediately. Payments to be made to Clerk of the Court, District of Idaho, 550 W. Fort St., MSC 039, Boise, ID 83724. Clerk shall disburse restitution payments to the victim, IRS Special Agent Steven Hines.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

X The defendant shall pay the cost of prosecution of $ 13,741.54, due on or before September 6, 2005.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

$ 135,500.00 in U.S. currency as previously ordered by the Court on March 25, 2005, in Case Number 3:02-CR-00142-RCT.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. DAVID ROLAND HINKSON, Defendant.	Case No. CR-04-127-S-RCT **MEMORANDUM DECISION AND ORDER** (Filed Apr. 22, 2005)

Before the Court is the Defendant's Rule 33 Motion for New Trial or, Alternatively, Motion to Dismiss (Docket # 224), the Government's brief in opposition (Docket # 234), and Defendant's reply (Docket # 237). For the reasons discussed below, the Court DENIES the Defendant's motions.

DISCUSSION

I. Motion for New Trial for Newly Discovered Evidence

The Defendant moves the Court for a new trial under Fed. R. Crim. P. 33(a) on the basis of alleged newly discovered evidence. He argues that this new evidence proves that witness Elvin J. Swisher produced a forged military record document to the Court (the "amended DD-214"). The Defendant fails to meet his burden of demonstrating a right to a new trial.

To warrant a new trial on the basis of new or newly discovered evidence the Defendant:

> must show that (1) the evidence is newly discovered; (2) the failure to discover the evidence is not attributable to a lack of diligence by the defendant; (3) the evidence is material to the issues at trial; (4) the evidence is neither cumulative nor impeaching; and (5) the evidence indicates that a new trial would probably result in an acquittal.

United States v. Waggoner, 339 F.3d 915, 919 (9th Cir. 2003) (citing *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000)). However, allegations that a government witness made untruthful statements as a basis for showing "newly discovered evidence affecting his credibility at the trial" are generally "merely cumulative or impeaching" and not ordinarily "an adequate basis for the grant of a new trial." *Mesarosh v. United States*, 352 U.S. 1, 5 (1956) (internal quotation and citation omitted).

Initially, the Court finds that Defendant is unable to establish that the failure to discover this evidence was not due to his counsel's lack of diligence. Defense counsel acknowledged on the record during Swisher's testimony that the Defense had been investigating Swisher's military record for "quite some time" because counsel for Hinkson were suspicious, given the witness' date of birth (January 13, 1937), as to whether he had actually served in the Korean War during a time when hostilities were still ongoing such that Swisher could have received the battlefield

injuries about which he had previously testified in other proceedings. *See* Sidebar Conf., Trial Tr., Vol. 5 (January 14, 2005), pp. 1113:19-1114:8. Swisher testified to receiving injuries from his military service in a prior Idaho state court civil case deposition (to which Hinkson was a party), taken by defense attorney Wesley Hoyt on October 11, 2004 (Gov't Opp. Br. Exh 2, p. 43:18-20), and two grand jury appearances, on April 16, 2002 (*id.*, Exh. 3, p. 4:21-24), and on February 10, 2004 (*id.* Exh. 4, pp. 3:11-18, 5: 12-15), leading to the indictments on which Hinkson was subsequently found guilty. Thus, the Court finds that defense counsel had ample time to investigate Swisher's record prior to trial, but was not diligent in pursuing the issue.

Further, the Court notes that most of the proffered evidence is not "newly discovered" because the Defendant was in possession of the bulk of the evidence at trial. The only new evidence is: (1) the affidavit of Retired Colonel W. J. Woodring, Jr., which declares that his signature on Swisher's "amended" DD-214 (produced by Swisher on the witness stand at trial) is forged; and (2) the affidavit of Chief Warrant Officer W. E. Miller, which is itself only the officer's interpretation of documents that the Defendant possessed during trial. The substance of both proffered documents is not new and is generally cumulative of previously available information. Also, the proffered evidence is impeachment evidence and so is not a valid basis for a new trial. *See Waggoner*, 339 F.3d at 919 (rejecting evidence cited by the defendant

in support of his new trial motion as "cumulative, impeachment-related, or both").

Most importantly, the proffered "new" evidence is not material to the issue at trial, nor would a new trial probably result in an acquittal, because the evidence is inadmissible. As the Court previously held on the record at trial (Trial Tr. pp. 2605:18-2612:3) and now reiterates, admission of the proffered documents and testimony is still prohibited by Fed. R. Evid. 608(b), which bars introducing extrinsic evidence of the witness' past conduct.[1] Rule 608(b) allows a cross-examiner to impeach a witness by asking him about specific instances of past conduct which are

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[1] Defendant asserts that the Court gave him the "Hobson's Choice" of reopening cross-examination or calling a military records custodian to testify. *See* Defendant's Rule 33 Motion at 4. The Court gave Defendant no such choice. The Court asked defense counsel to provide legal authority that would compel the Court to admit extrinsic evidence such as the testimony of a records custodian in spite of Rule 608(b)'s prohibition against such extrinsic evidence. *See* Trial Tr., Vol. 10 (January 24, 2005), pp. 2310:8-24, 2319:14-18, 2323:4-10. Even after such prompting by the Court, defense counsel was unable to cite to a case establishing legal authority to compel such evidence. The Court therefore exercised its discretion under Rule 608(b) and gave the Defendant the option of reopening cross-examination or letting the record stand with all of the testimony relating to the military commendation stricken from the record. *See* Trial Tr., Vol. 10 (January 24, 2005), pp. 2607:23-2612:3. The Court ruled that no extrinsic evidence on the issue of Swisher's military record was admissible because it would require a "mini-trial" on a collateral issue, which necessarily precluded admission of testimony of a records custodian to interpret the Department of Defense form and Swisher's military file. *See id.*, p. 2610:5-13.

probative of his veracity or "character for truthfulness or untruthfulness." *United States v. Abel*, 469 U.S. 45, 55 (1984); *see also United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002). However, Rule 608(b) "limits the inquiry to cross-examination of the witness . . . and *prohibits* the cross-examiner from introducing extrinsic evidence of the witness' past conduct" *Abel*, 469 U.S. at 55 (emphasis added); *see United States v. Brooke*, 4 F.3d 1480, 1484 (9th Cir. 1993) (noting under the "explicit" rule of Rule 608(b), a party is "stuck with whatever response" is given in cross-examination and may not impeach through extrinsic evidence). The Court gave Defendant the opportunity to reopen cross-examination by recalling Swisher on the veracity of his military record, but warned defense counsel that they would be stuck with Swisher's answers and could argue his credibility in closing. *See* Trial Tr., Vol. 10 (January 24, 2005), pp. 2607:23-2612:3.

Defendant attempts to recharacterize the evidence as central to the Government's case by arguing that Swisher's silent wearing of a miniature Purple Heart lapel pin on his breast-pocket while testifying made his military record "intrinsic to both his credibility and the [G]overnment's theory of prosecution." The argument is meritless because the Government elicited on direct examination only that Hinkson *believed* that Swisher had substantial combat experience; whether or not Swisher had *actually* served in combat or was wounded and decorated was never relevant to the key question as to whether Hinkson

thought Swisher to be a potential contract killer who would willingly agree to murder the three federal officials Hinkson wanted dead. The proffered evidence is therefore inadmissible extrinsic evidence under Rule 608(b) because the *only* issue to which this evidence was relevant at the trial was Swisher's character for truthfulness.

Defendant's allegation that the Court unconstitutionally limited his ability to cross-examine Swisher on this issue substantially mischaracterizes what occurred at trial. Even though all evidence regarding Swisher's military record was stricken from the record, the Court *allowed* the Defense the opportunity to reopen cross-examination of Swisher to permit limited inquiry into the allegedly forged military document. Moreover, the Court expressly granted the Defendant the right to reference the allegedly impeaching documents during its cross-examination. Trial Tr., Vol. 10 (January 24, 2005), pp. 2607:23-25, 2610:14-21. *See United States v. Jackson*, 882 F.2d 1444, 1448-49 (9th Cir. 1989) (holding that government's reference to a written statement was admissible under Rule 608(b) where the government did not introduce the statement into evidence but instead questioned the witness about the contents of the document). Defendant therefore had ample opportunity to create doubt in the minds of the jurors as to Swisher's truthfulness and, in spite of the Court's clear authorization to reopen the issue to allow further cross-examination of this key Government witness, the Defendant chose not to do so. *See*

Colloquy with defense counsel Thomas J. Nolan on January 25, 2005 (not yet transcribed). The Defendant cannot now claim that he is due a new trial simply because he regrets his strategic decision not to reopen the attack to further cross-examine Swisher.

The Court concludes that Defendant's argument that the proffered "new" evidence demonstrates fraud on the Court is irrelevant here.[2] The inquiry is whether a new trial is warranted by the proffered evidence. As discussed above, the proffered evidence is inadmissible, immaterial, and would not be likely to result in an acquittal. *See Waggoner*, 339 F.3d at 919. Thus, Defendant does not meet his Rule 33 burden. *See id.* The evidence does not tend to show any bias or prejudice Swisher may have had against the Defendant, nor does it go to establishing any other motivations under which he may have been acting. *Cf. United States v. Schoneberg*, 396 F.3d

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[2] Moreover, Defendant's fraud argument is without merit. As the Court found when it rejected this argument at trial, the Court is not the finder of fact here; that is the role of the jury. Trial Tr., Vol. 10, p. 2608:13-17. In this case, the jury has not been affected by the allegedly fraudulent representation because the jurors never saw the documents in question, the short line of questioning on this issue was stricken from the record, and a curative instruction was immediately given. *See* Colloquy with Counsel and Instruction Given to Jury, Trial Tr., Vol. 5 (January 14, 2005), pp. 1121:17-1132:9. The Court therefore found that Swisher's alleged misconduct did not corrupt or "harm the integrity of the judicial process" and so as a matter of law does not constitute fraud on the Court. *See In re Levander*, 180 F.3d 1114, 1119 (9th Cir. 1999); Trial Tr., p. 2609:3-6.

1036, 1041-42 (9th Cir. 2005) (holding that the district court abused its discretion in limiting cross-examination on witness' possible incentive to lie).

Defendant argues that wearing a button was "silent testimony" (notwithstanding the Court's instruction to the jury to disregard any consideration of Swisher's Purple Heart testimony on cross-examination), but does not explain clearly as to what. Defendant seems to be arguing that the jury would be more likely to believe the testimony of a combat veteran than a non-combat veteran; an irrational assumption unsupported by any proffer. This speculation is simply not sufficient to warrant a new trial.

Finally, the short amount of testimony before the jury regarding this issue was stricken from the record, and the jury never saw *any* of the documentation that was marked for the record at sidebar or reviewed *in camera*, including the contested Form DD-214 (Def. Exh. M). Trial Tr., Vol. 5 (January 14,2005), pp. 1124:25-1125:14. The document submitted by Swisher has therefore had no practical effect on the jury deliberations in this case. *See Gibson v. Ortiz*, 387 F.3d 812, 822 (9th Cir. 2004) (stating that juries are presumed to follow the court's instructions).

The Court also reiterates its prior ruling at trial that the evidence of Swisher's military record is inadmissible under Rule 403. Trial Tr., pp. 2609:7-2612:3. Rule 403 bars evidence whose probative value is substantially outweighed by the danger of confusion of the issues, misleading the jury, or by considerations

of undue delay and waste of time. *See* Fed. R. Evid. 403. Authentication and laying a foundation for Defendant's proffered extrinsic evidence would have wasted considerable trial time on a confusing, tangential issue unrelated to the factual issues to be resolved by the jury. *See United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992) ("The purpose of barring extrinsic evidence [under Rule 608(b)] is to avoid holding mini-trials on peripherally related or irrelevant matters.").

Defendant's attempt to impeach the jury verdict here with this inadmissible evidence is equally unavailing. He asserts that if the jury had considered the "new" evidence, at least one of the jurors would not have found him guilty. He proffers an affidavit signed by one of the jurors, Ben S. Casey, which states that Casey would not have found Hinkson guilty had he known that Swisher "was not a credible witness." *See* Def. Rule 33 Motion, Exh. 3 (hereinafter "Casey Affidavit"). A jury verdict may certainly be impeached on the basis of juror misconduct where a juror relies upon extrinsic evidence not admitted at trial. *See, e.g., United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). But that did not happen here. Defendant offers no legal authority for his proposition that a jury verdict may be impeached on the basis of evidence that would be inadmissible at a new trial. Indeed, the argument is nonsensical. Whether inadmissible evidence would have affected the jury deliberations is simply irrelevant to the validity of a jury verdict.

Furthermore, the Casey Affidavit is itself inadmissible under Fed. R. Evid. 606(b), which states that:

> [a] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. . . .

Fed. R. Evid. 606(b). Rule 606(b) restricts the admission of juror testimony to only "facts bearing on extraneous influences on the deliberation, in the sense of overt acts of jury tampering." *United States v. Pimentel*, 654 F.2d 538, 542 (9th Cir. 1981); *see Hard v. Burlington Northern R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989) ("Rule 606(b) bars not just juror testimony but evidence of any sort as to a statement by a juror concerning jury deliberations, so long as a juror would be barred from making the same statement in the form of testimony in court."). Through his affidavit, Casey discusses his mental processes in his deliberations, stating "I relied upon the credibility of Mr. Swisher when I cast my vote to convict Mr. Hinkson. . . ." Casey Affidavit, ¶ 4. He further discusses on what basis he might have changed his decision. *Id.*, ¶¶ 3, 5. These statements concerning his deliberations and reasoning are inadmissible to impeach a verdict. *See United States v. Rohrer*, 708 F.2d 429 434 (9th Cir.1983) (finding affidavits regarding

jurors' individual or collective thought processes inadmissible under Rule 606(b)).

Ultimately, the Federal Rules of Evidence would not apply any differently in a new trial; the proffered extrinsic evidence would remain inadmissible, and therefore would neither be material to the issues necessary to be decided at trial nor probably result in an acquittal. *See Waggoner*, 339 F.3d at 919. The Court granted the Defendant his chance to reopen cross-examination on Swisher's military record to the extent allowed by Rule 608(b), but he nonetheless chose not to do so. He cannot now complain that he was prejudiced by his tactical decision. For these reasons, the Court DENIES Defendant's motion for a new trial on the basis of newly discovered evidence.

II. Motion for New Trial for Government's Failure to Disclose

Although not clearly presented as a motion for such, Defendant also argues that he should be granted a new trial on the basis that the Government failed to meet its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The Court may grant a motion for a new trial "if the interest of justice so requires." *See* Fed. R. Crim. P. 33. The Court will therefore treat the argument as a *Brady/Giglio* motion.

A prosecutor has a constitutional duty to disclose material, exculpatory evidence to the defense, regardless of whether defense counsel makes a specific

request. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see Brady*, 373 U.S. at 87. The duty extends not only to information relevant to guilt, but also to evidence that would tend to impeach the prosecution's witnesses. *Bagley*, 473 U.S. at 676; *Giglio*, 405 U.S. at 154. A breach of that duty violates due process when: (1) the prosecution suppressed exculpatory or impeachment evidence that was actually or constructively in its possession, regardless of the good or bad faith of the prosecutor; and (2) the suppressed evidence was material. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995); *Brady*, 373 U.S. at 87. The defendant must also demonstrate that prejudice ensued. *United States v. Si*, 343 F.3d 1116, 1122 (9th Cir. 2003).

A necessary corollary is that the Government has no duty to disclose what it did not know and had no duty to learn. *See, e.g., United States v. Plunk*, 153 F.3d 1011, 1027 (9th Cir.), amended by 161 F.3d 1195 (9th Cir. 1998) (finding no *Brady* duty to disclose information in Federal Public Defender's files regarding prior inconsistent statements made by a government witness because *Brady* duty extends only to information in the possession or control of law enforcement personnel), *overruled on other grounds by United States v. Hankey*, 203 F.3d 1160, 1169 n.7 (9th Cir. 2000); *see also Hollman v. Wilson*, 158 F.3d 177, 180-81 (3d Cir. 1998) (concluding there was no duty to disclose witness' full criminal history where part of the history was inaccessible due to an administrative mistake); *Vega v. Johnson*, 149 F.3d 354, 363 (5th Cir. 1998) (concluding there was no duty to disclose

pending indictment of a prosecution witness in another county where defendant did not demonstrate that the prosecution could have discovered the indictment with a routine criminal history check).

Here, the Government was not actually in possession of the evidence in question prior to the day of Swisher's trial testimony. Even after Swisher gave prosecutor Sullivan the amended DD-214 document, it was not readily apparent that it could be impeaching evidence. During his testimony, Swisher was wearing a small Purple Heart lapel pin. At side bar, defense counsel explained that they had been trying to "dig into" Swisher's military history "for quite some time" and wanted to ask Swisher about the pin and his military record. The Court agreed over Government objection. Trial Tr., Vol. 5 (January 14, 2005), pp. 1113:19-1116:12. When defense counsel confronted Swisher on January 14, 2005, with a letter they had just received that afternoon during trial from the St. Louis, Missouri, U.S. National Archives and Records Administration's National Personnel Records Center, Military Personnel Records Branch (hereinafter "National Personnel Records Center"), which indicated that Swisher might not be entitled to a Purple Heart, Swisher pulled the "amended" DD-214 in question out of his jacket. Def. Exh. M. The DD-214 indicated that he was entitled to the commendation. Only at that point did the DD-214 document's

possible impeachment value become apparent.[3] Therefore, the key inquiry is whether the Government had an obligation prior to trial to investigate Swisher's military record or whether such knowledge should be imputed to it. Otherwise, there has been no *Brady/Giglio* disclosure violation.

The contours of a prosecutor's duty to investigate or collect additional evidence are not entirely clear. Due process requires that a prosecutor "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles,* 514 U.S. at 437. Case law identifies three general situations in which the prosecution will be found to have "suppressed" exculpatory information of which it was actually unaware. First, the prosecution may fail in its due process obligation to investigate where questionable evidence on its face "would alert anyone . . . to the strong possibility" that the evidence was false. *Commonwealth of N. Mariana Islands v. Bowie,* 243 F.3d 1109, 1117-18 (9th Cir.

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[3] Outside of the jury's presence, defense counsel then moved for a mistrial, which the Court denied, finding that "there was no reason for the Government to believe with regard to [the DD-214 in question] that the contents of the [DD-214] would be impeaching in any way, shape or form." Trial Tr., Vol. 5 (January 14, 2005), pp. 1127:24-1128:13. The Court found further that "until the receipt of that exhibit" the Government "had no reason to believe that [the DD-214] was disclosable under *Brady* or *Giglio* because it was not impeaching." *Id.*, p. 11.29:11-15. At defense counsel's request, the Court then ordered the jury to disregard all of the testimony regarding the alleged military commendation. *Id.*, pp. 1128:23-1132.9.

2001) ("[A] prosecutor [must] act when put on notice of the real possibility of false testimony."). A prosecutor may not "refused[ ] to search for the truth and remain[ ] willfully ignorant of the facts." *Id.* at 1118.

Second, knowledge may be imputed to the prosecutor where the impeaching evidence is known to other members of the prosecution team. Imputed knowledge may include information known to other prosecutors in the same office, in the hands of the police, or possessed by other investigative agencies involved in the prosecution. *See, e.g., Kyles,* 514 U.S. at 437-38 (police); *United States v. Steel,* 759 F.2d 706, 714 (9th Cir. 1985) (imputing knowledge of information held by FBI agent to prosecutor because investigative officers were also part of the prosecution). It might also include agencies with special interest in the prosecution. *See, e.g., United States v. Wood,* 57 F.3d 733, 737 (9th Cir. 1995) (imputing information known to the FDA to the prosecutor in prosecution for conspiracy to defraud the FDA because, as the agency interested in the prosecution, the FDA was "part of the prosecution" for *Brady* purposes).

Third, knowledge may be imputed to the prosecutor, or a duty to search may be imposed, in cases where a search for readily available background information is routinely performed, such as routine criminal background checks of witnesses. *See, e.g., Carriger v. Stewart,* 132 F.3d 463, 480 (9th Cir. 1997); *United States v. Strifler,* 851 F.2d 1197, 1201-02 (9th Cir. 1988); *United States v. Cadet,* 727 F.2d 1453,

1467 (9th Cir. 1984); *see also United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991).

None of these situations existed here. The Court finds as matter of fact that the Government was not on notice and had no reason to know that the amended DD-214 document (Def. Exh. M) first presented by Swisher to one of the prosecutors, Michael Sullivan, on the morning of his testimony, was possible impeachment evidence until after defense counsel confronted Swisher with the letter received later that afternoon from the National Personnel Records Center during his cross-examination. Until that time, there was no reason for the Government to suspect that the document Swisher had given them earlier that day was not authentic or that it might become involved in his testimony in the criminal trial. On its face, the document looks authentic, and the Court finds that the Government prosecutors and their investigative agencies were not in possession of any conflicting information. Therefore, the Court cannot impose a duty to investigate where there was no reason to question this tangential evidence whose potential impeachment value was not apparent when first seen that morning. *Cf. Bowie*, 243 F.3d at 1118.

Next, imputed knowledge cannot be invoked by the Defendant here because apparently the only agency which had the information was the National Personnel Records Center in St. Louis, which has no association or interest in this criminal case. *See United States v. Avellino,* 136 F.3d 249, 255 (2d Cir. 1998) (declining to impose an unlimited duty on a

prosecutor to inquire of other governmental offices not working with the prosecutor's office on the case, because to do so would be to adopt a "monolithic view of the government" that would lead to prosecutorial paralysis). Finally, there is no suggestion that it would be routine for prosecutors or law enforcement officers to run background records checks that would include a witness' decades-old archival military records.

Furthermore, the Court can find no case law extending the duty to investigate for *exculpatory* evidence to fully encompass a duty to investigate for all *impeachment* evidence, so it is unclear whether such an obligation would even apply here. Regardless, the Court concludes that even if a duty to investigate potentially impeaching evidence exists, no such obligation was violated here. The prosecutors did not have an obligation to investigate Swisher's military background prior to the trial because they were not on notice that it might become relevant, let alone potentially impeaching, and the Court also finds that there was no evidence of bad faith in failing to investigate. The Court notes that defense counsel asserted at trial that they had been suspicious of Swisher's military history for a long time, but they apparently never asked the Government to conduct further investigation.

At trial, the Government only argued that Defendant had reason to believe that Swisher had a combat record; Swisher's actual military record was simply not an issue in the trial until defense counsel

chose to make it one. Had defense counsel communicated their suspicion about Swisher to the Government at an earlier time, the Government might have been on notice. However, by making the strategic decision of keeping secret their suspicion, defense counsel lost their opportunity to prompt the Government earlier to investigate Swisher's military background.

Finally, Defendant fails to establish that he has been prejudiced by the late disclosure of Swisher's military record. *See Stricker v. Greene*, 527 U.S. 263, 281-82 (1999). Prejudice exists only "if the withheld evidence is material to the defendant's guilt or punishment, such that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Si*, 343 F.3d at 1122 (internal quotation marks and citation omitted). As discussed above, the information was made available to the Defendant as soon as it came into the Court's and the Government's possession. The evidence itself was inadmissible, but the Defendant was granted the opportunity to reopen cross-examination and attempt to impeach Swisher by questioning him on the basis of the military documents received mid-trial from St. Louis. The Defendant decided not to use the disclosed information by declining to reopen cross-examination. He cannot now argue that he was prejudiced by the lack of evidence he possessed but chose not to use. For these reasons, the Court finds and concludes that there has been no

Brady/Giglio disclosure violation, and Defendant's motion for a new trial on this basis is DENIED.[4]

III. Motion for Dismissal

The Defendant moves the Court alternatively for a complete dismissal. He argues that the Government committed prosecutorial misconduct by failing to investigate and disclose Swisher's military record. He argues at various points that the Government engaged in fraud, obstruction of justice, knowing use of perjured testimony, and asserts that the Government's conduct may constitute a criminal act.

Dismissal for prosecutorial misconduct violating a defendant's due process right "requires (1) flagrant misbehavior and (2) substantial prejudice." *United States v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993). The Defendant fails to establish either. His allegations of misconduct are unreasonably inflammatory and without factual foundation. As noted above, the

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[4] The Court notes also that even if a *Brady* violation regarding disclosure of Swisher's military record occurred, a new trial would still not be warranted. A new trial is only appropriate if, "weighed as a whole, the evidence characterized as *Brady* material" undermines the Court's "confidence in the jury verdict." *Waggoner*, 339 F.3d at 919 n.5 (citing *United States v. Sarno*, 73 F.3d 1470, 1506 (9th Cir. 1995). The alleged *Brady* evidence here is "marginal, ambiguous, cumulative, inadmissible, unreliable, inculpatory, irrelevant, or of negligible probative worth" and so fails to meet this standard. *Id.*

Government did not fail in its disclosure obligations. Furthermore, there is no factual link whatsoever between the Government's conduct here and any allegedly wrongful conduct on the part of witness Swisher. There is no indication that the Government had any awareness that any of Swisher's testimony regarding his military background could be false prior to defense counsel's mid-trial receipt of the surprise letter from the National Personnel Records Center. *Cf United States v. Zuno-Arce,* 339 F.3d 886, 889 (9th Cir. 2003) (noting that to prevail on a claim that the prosecution presented false evidence, "the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material"). The Government did not receive a copy of the allegedly forged DD-214 until the morning of Swisher's testimony; they certainly had no opportunity, or any reason, to investigate the document at that point. The Court finds that at no point did the Government's conduct amount to "flagrant misbehavior." *See Kearns,* 5 F.3d at 1253.

Furthermore, Defendant fails to demonstrate "substantial prejudice." *See id.* Dismissal is "an appropriate sanction for a constitutional violation only where less drastic alternatives are not available." *Id.* 1254-55 (noting that granting a continuance and allowing additional cross-examination may be sufficient sanction); *see Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993) ("Dismissal of an indictment is

considered a 'drastic step' and is generally disfavored as a remedy."). Defendant fails to allege any prejudice from the delay in disclosure of the information regarding Swisher's military record, the full extent of which both the Government and the Defendant acquired at the same time. Whatever potential prejudice might have arisen from the Defendant not receiving the additional information at an earlier time was sufficiently mitigated by the Court's offer granting the Defendant the opportunity to reopen cross-examination of Swisher to attempt to impeach his prior testimony on the basis of the complete military records. Therefore, Defendant's motion for dismissal is DENIED.

IV. Motion for Recusal

The Defendant also asks this Court to recuse itself from this case, arguing that my impartiality may be reasonably questioned and that recusal is required under 28 U.S.C. § 455(a). 28 U.S.C. § 455(a) requires that a United States judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* Recusal is required when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *See Moideen v. Gillespie*, 55 F.3d 1478, 1482 (9th Cir. 1995). Therefore, recusal is justified "either by actual bias or the appearance of bias." *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993).

However, no reasonable person could reach the conclusion that recusal is required here in the face of Defendant's repeated and persistent misconduct and abuse of the legal system. Recusal is generally not required where a party attempts to *force* a judge to recuse himself As the Ninth Circuit has acknowledged:

> [i]t has long been established [ ] that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge: Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could evade the punishment due to his offenses, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion. . . .

Standing Committee on Discipline v. Yagman, 55 F.3d 1430, 1443-44 (9th Cir. 1995) (internal quotation marks and citation omitted).

The Ninth Circuit has been fortunate in not yet having to address whether alleged death threats made against a judge warrants forced recusal. Other circuits have had to address the issue. In *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994), the Tenth Circuit recognized that, while in some circumstances recusal is necessary, various factors may suggest that where, as here, the alleged death threats against a judge are made only to impact the

judicial proceeding they should not force a recusal. The Tenth Circuit in *Greenspan* noted that:

> if a death threat is communicated directly to the judge by a defendant, it may normally be presumed that one of the defendant's motivations is to obtain a recusal, particularly if he thereafter affirmatively seeks a recusal[;]
>
> [or]
>
> *if a defendant were to make multiple threats to successive judges or even to multiple judges on the same court*, there might be some reason to suspect that the threats were intended as a recusal device.

Greenspan, 26 F.3d at 1006 (emphasis added). This is what happened here.

The Second Circuit also addressed this issue and acknowledged that, even if they assumed that a threat was credible, recusal was not required where death threats against the judge "may well have been nothing more than an attempt to harass the government and divert resources." *United States v. Yousef*, 327 F.3d 56, 169-70 (2d Cir. 2003).

I find as a matter of fact and hold that, regardless of whether the alleged threats against me here ever had any credibility, the Defendant's actions are clearly manipulative and made only in an attempt to obtain a different judge, delay the proceedings, to harass, or for other vexatious or frivolous purposes, and therefore my recusal is not required. I base my holding on the following findings.

Defendant has previously engaged in protracted frivolous civil litigation in Federal District Court seeking to abuse the legal process to harass and intimidate federal officials from performing their duties. *See Hinkson v. Hines, et al.*, No. 02-171-N-LMB (Hinkson's civil rights (*Bivens*) litigation in U.S. District Court filed against Assistant United States Attorney (A.U.S.A.) Nancy Cook, Internal Revenue Service (I.R.S.) Special Agent Steven Hines, I.R.S. Revenue Agent Jerry Vernon, and attorney Dennis Albers, which was promptly dismissed by United States District Judge Edward J. Lodge). Additionally, Defendant has in the past filed administrative complaints against several of these and other federal officers with the Commissioner of Internal Revenue, the Chief Postal Inspector, a District Director of the I.R.S., and the U.S. Attorney General. He has also filed internal affairs-type complaints with the Office of Inspector General of the Department of the Treasury in an effort to intimidate and retaliate against Revenue Agent Jerry Vernon and C.I.D. Special Agent Steven Hines. He also filed complaints with the U.S. Department of Justice Office of Professional Responsibility against A.U.S.A. Nancy Cook.

After being indicted in the Tax Case, *United States v. David Roland Hinkson*, No. CR-02-0142-C-EJL, the Defendant successfully forced the recusal of Judge Lodge and forced A.U.S.A. Cook off the case as his prosecutor by engaging in the solicitation of the judge's murder and the murder of the prosecutor and lead case agent from the I.R.S. as the jury later found

true in this case. He also unsuccessfully sought recusal of United States Magistrate Judge Mikel Williams, who handled Hinkson's initial bail and detention matters in the case (subsequently affirmed by this Court and the Ninth Circuit Court of Appeals). *See* Docket Nos. 9, 14.

As his baseless administrative complaints and frivolous civil lawsuits were judicially dismissed, denied, or deemed unfounded by the various government agencies conducting civil, criminal, and administrative enforcement proceedings against him, Defendant turned to soliciting acts of violence against federal officers resulting in the return of the Superseding Indictment on which Defendant has been found guilty of three counts.

There is no question in the Court's mind that Defendant has been attempting to orchestrate my recusal as the current trial judge because of his dissatisfaction with the guilty verdict in the Tax Case, *United States v. Hinkson*, No. 02-CR-0142-C-RCT, over which I also presided, and as a result of the guilty verdict and adverse rulings made against him in pretrial and mid-trial motions in the Solicitation and Threats Case, No. 04-CR-0127-S-RCT.

In the face of this record, extending back for more than five years of vexatious conduct, the only possible conclusion this Court can draw is that Defendant is once again attempting to "game the system" and pervert the due administration of justice by engaging in these kinds of stalling tactics.

Defendant attempted shortly before trial and well past the deadline set for the filing of pretrial motions to secure his release from confinement at the Ada County Jail to less secure psychiatric clinics or home detention on the grounds of mental illness. Evidence reviewed in pretrial proceedings and during trial suggests that Defendant was attempting to flee to Central America if the Court granted less restrictive conditions of confinement. Defendant previously attempted to and actually has transferred sufficient funds to offshore accounts in foreign countries so that he could flee the jurisdiction in the event that conviction seemed likely. Defendant admitted to a jailhouse informant, Chad Croner, that he was hoping to succeed in this plan so that he could flee the jurisdiction before trial.

Evidence was also received that suggested that Defendant continued to solicit the murder of witnesses, federal officers, and others while he has been confined during the pendency of this case. The record of this Defendant's behavior leaves no doubt in this Court's mind that uttering threats about witnesses, law enforcement officers, prosecutors, private attorneys, judges, and anyone else he perceives to be conspiring against him will continue into the future.

The timing of Defendant's actions convinces me beyond any doubt that his motive is and has been to delay the proceedings or to obtain a different judge who might free him from custody so he could abscond to a haven country. The alleged threats against me discovered in December 2004 did not start until after

his guilty verdict following jury trial in the Tax Case and my adverse rulings against him on numerous pretrial motions in the Solicitation and Threats Case.

Defendant's conduct in the trial proceedings to date demonstrates his belief that sheer repetition of arguments and motions may accomplish his objectives. He has engaged in repeated attempts to argue and reargue the same issues the Court has previously rejected. *See, e.g.*, Order Regarding Motion for *De Novo* Detention Hearing (Docket # 129). This conduct demonstrates that Hinkson believes that, although his first attempts do not succeed, he may eventually be able to force a recusal or at least to delay the proceedings.

Defendant's conduct in the trial proceedings also demonstrates that he has been attempting at every opportunity to divert the Court's and the Government's resources from their priority obligation of adequately preparing for trial, considering the evidence at trial, and adjudicating the charges against him. The Defendant has repeatedly missed deadlines set by the Court and has offered insubstantial or no reasons to justify his delays. *See, e.g.*, Amended Order Regarding Government's Motion to Strike (Docket # 230). Considering the totality of circumstances, the Court finds that the Defendant was attempting to distract both the Court and the Government from actually conducting the trial, and now employs the same tactics to try to force my recusal to further delay his impending punishment.

The Defendant's demonstrated willingness to repeatedly and indiscriminately communicate his threats to various inmates with whom he has contact suggests that he wanted the information communicated to the Court. Defendant was already aware that one of his recent cellmates, Chad Croner, had come forward to allege that Defendant made threats against me, and so was aware that any of his statements in jail would be communicated to the Court. From this, it may therefore be presumed that one of his motivations was to obtain recusal. *See Greenspan*, 26 F.3d at 1006.

The Defendant's history of making death threats against other federal and state trial judges who are presiding over cases in which he is a litigant establishes his *modus operandi* to harass every court and to seek recusal of all judges against whom he harbors substantial resentment. Based on these findings and given this lengthy history of similar repetitious misconduct, I find that Defendant's real motive for the alleged death threat was to improperly force my recusal. On the basis of both my familiarity with the record in the Tax Case and the record here in the Solicitation Case, I further find that, because Defendant has previously and repeatedly engaged in similar misconduct directed at other judges, prosecutors, investigators, attorneys, and witnesses, it is highly probable that he will continue to engage in similar and additional misconduct in the future.

I therefore find that it would be futile and a substantial waste of judicial resources for me to

recuse myself now because it is highly likely that any subsequent judge assigned to Defendant's case will be subject to the same threats and the same vexatious pressure to recuse himself. For these reasons, I hold that 28 U.S.C. § 455(a) does not require that I recuse myself from this case.

Moreover, recusal under 28 U.S.C. § 455(b) is not necessary because I did not have personal knowledge of disputed evidentiary facts concerning the proceeding. Defendant claims that I was "personally presented with a death threat," showed "continual" bias, and that my statement on the record that I did not take the alleged threats against me seriously (*see* Transcript of January 7, 2005, Pretrial Hearing, p. 93:16-25) demonstrated actual knowledge of the case. *See* Def. Memo. in Support, p. 16. However, the case involved only his threats against the three named victims, not myself. Further, no information regarding any threats against me was introduced at trial, and therefore it was never an issue in dispute before the jury during the proceedings.

Regardless, my subjective reaction when initially reported in December 2004 to discount the veracity of the alleged threats against me was made after I referred the matter to United States Circuit Judge Thomas G. Nelson, who held a closed hearing on the alleged threat in which the undersigned had no involvement or knowledge (where Judge Nelson concluded that my recusal was not necessary), and after my consultation with the U.S. Marshals Service, who recommended as a result of their threat assessment

that no security detail was warranted for me or my family. This does not establish or constitute personal knowledge of disputed facts to warrant recusal.

Finally, Defendant fails to allege in what way the Court demonstrated bias here. *See* 28 U.S.C. § 144 (requiring party to file a timely affidavit setting forth facts and reasons for belief that bias or prejudice exists). For these reasons, Defendant's motion for recusal is DENIED.

V. Evidentiary Hearing

Defendant argues for the first time in his reply brief that he is entitled to an evidentiary hearing on these matters. Arguments not raised in an opening brief are waived. *See United States v. Bird*, 359 F.3d 1185, 1189 n.1 (9th Cir. 2004) ("Under the law of this circuit, we decline to consider an issue which was not presented to the district court in a proper motion, or raised as an issue in appellant's opening brief."). Regardless, the Court concludes that no evidentiary hearing is required. The proffered evidence is inadmissible and would therefore not be likely to result in an acquittal in a new trial.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that the Defendant's Rule 33 Motion for New Trial or, Alternatively, Motion to Dismiss (Docket # 224) is DENIED. Inherent in that ruling, the Court DENIES

the motions for new trial based on newly discovered evidence, *Brady/Giglio* violations, prosecutorial misconduct, dismissal, recusal, and the request for an evidentiary hearing,

IT IS SO ORDERED.

DATED this 22nd day of April, 2005, at Seattle, Washington.

/s/ Richard C. Tallman
RICHARD C. TALLMAN
United States Circuit Judge
Sitting by designation

No. 10-869

In the Supreme Court of the United States

DAVID ROLAND HINKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly excluded extrinsic evidence indicating that a government witness was not a decorated combat veteran.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the limited en banc court of appeals (Pet. App. 92-224) is reported at 585 F.3d 1247. The earlier opinion of a three-judge panel of the court of appeals (Pet. App. 226-336), which was vacated upon the grant of rehearing en banc, is reported at 526 F.3d 1262.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2009. A petition for further rehearing was denied on July 14, 2010 (Pet. App. 1-91). On September 27, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 11, 2010, and the petition was filed on November 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Idaho, petitioner was convicted on three counts of soliciting a crime of violence, in violation of 18 U.S.C. 373. Pet. App. 338. He was sentenced to consecutive 120-month terms of imprisonment on each of those counts, and a consecutive 36-month term of imprisonment for the commission of offenses while on release, all to be served consecutively to terms totaling ten years of imprisonment on prior convictions for tax evasion and related crimes. *Id.* at 340. A panel of the court of appeals reversed (*id.* at 226-336), but on rehearing a limited en banc court affirmed. *Id.* at 92-224.

1. a. Petitioner is a tax objector who refused to pay income tax on the profits of his business, which sold bottled water with alleged medicinal benefits. Pet. App. 93, 95. The government investigated petitioner for tax evasion and related offenses, for which petitioner was eventually arrested and convicted. *Id.* at 96-97 & n.1.

In 2004, a grand jury indicted petitioner on nine counts of soliciting a crime of violence, in violation of 18 U.S.C. 373, and two counts of threatening to murder the family of a federal official, in violation of 18 U.S.C. 115. Pet. App. 98-99. The indictment alleged that petitioner had solicited or threatened the murders of the Internal Revenue Service (IRS) agent, Assistant United States Attorney, and federal district judge assigned to his tax-evasion case. *Id.* at. 96, 98. Three of the Section 373 counts alleged that petitioner had solicited his employee and then-friend, Elven Joe Swisher, to torture and kill those federal officials. *Id.* at 99.

b. The government's theory at trial was that petitioner solicited Swisher because petitioner believed Swisher to be a military veteran who had killed in the

line of duty.[1] Swisher testified on direct examination that he had served in the Marine Corps; that he had told petitioner about that service; and that he had claimed to petitioner that he had killed in combat. Pet. App. 100; E.R. 21-22.

Swisher further testified as follows: Petitioner had initially told Swisher that he would pay "$10,000 per 'head'" for Swisher to torture and kill a local attorney and his family because the attorney was adverse to petitioner in a legal dispute. Pet. App. 96. Swisher thought petitioner was joking. *Ibid.* A couple of months later, petitioner told Swisher that he wanted the IRS agent and prosecutor in his tax-evasion case, and their families, treated in the same way as he had suggested for the local attorney. *Ibid.*; see E.R. 24. When Swisher told petitioner "that he was out of his mind," petitioner responded, "Well, you know, I know you're used to it. I mean, you have killed people." E.R. 24; see Pet. App. 96. Swisher was less convinced this time that petitioner was joking and threatened to contact law enforcement. *Id.* at 97; see E.R. 24. Petitioner then came to Swisher a third time several months later and again asked him to torture and kill the prosecutor and agent, their families, and the federal judge assigned to the case for "[a]t least $10,000 a head." E.R. 24. Petitioner "pleaded" with

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[1] In its opening statement, the government described Swisher as "a Marine, a Combat Veteran from Korea during the Korean conflict." E.R. 19. Although the statement that petitioner saw combat in Korea turned out to be incorrect (for reasons explained in the text), petitioner did not object to that statement at the time and did not assign any error to it on appeal. Pet. App. 100 & n.8. No court has found any government misconduct with respect to that statement or any other aspect of the prosecution.

Swisher, whom he called his "best friend," to do this for him, but Swisher declined. Pet. App. 97.

c. On cross-examination, petitioner sought to impeach Swisher's credibility. Pet. App. 101. He elicited testimony that Swisher had reported petitioner to authorities only after the two had experienced a falling out; that the two had been adversaries in civil litigation; and that Swisher believed that petitioner had attempted to have him killed. *Ibid.*; see *id.* at 97-98, 319. Petitioner's counsel also sought to identify inconsistencies in Swisher's trial testimony. *Id.* at 101.

After completing his cross-examination, petitioner's counsel requested a sidebar conference. Pet. App. 101; E.R. 26. Counsel stated during the sidebar that "[f]or quite sometime [sic], we have been trying to dig into [Swisher's] military history because we don't believe it's accurate." E.R. 25. Counsel told the court that "[b]ecause of [Swisher's] age and because of the time of the [Korean] war, we don't believe he was in the war." E.R. 25. Counsel also noted that Swisher appeared to be wearing a Purple Heart—a medal given to servicemembers wounded in combat—on his lapel, and counsel said that he had a letter from the National Personnel Records Center (NPRC) indicating that Swisher had not received any medals. Pet. App. 101-102, 139; E.R. 25. The government observed that it had not inquired on direct examination "about winning medals or combat," but had instead primarily focused on what Swisher had represented to petitioner about Swisher's military service. E.R. 25; see Pet. App. 102.

The district court permitted petitioner's counsel to inquire about Swisher's military service and the object on Swisher's lapel. Pet. App. 102; E.R. 25. In response to cross-examination questions, Swisher testified that he

was wearing a Purple Heart Medal awarded as a consequence of wounds he received while on a classified mission to free prisoners of war in North Korea following the armistice that terminated the Korean conflict. Pet. App. 103; E.R. 25-26. Petitioner's counsel then confronted Swisher with the NPRC letter (which was shown to Swisher but not to the jury). Pet. App. 102-103; E.R. 26. Swisher maintained that he had; indeed, received a Purple Heart and produced from his pocket what appeared to be a "replacement" military discharge form to that effect (which also was not introduced into evidence or shown to the jury). Pet. App. 103 & n.10; E.R. 26.

At a subsequent sidebar, the district court "agreed with the government that [petitioner's counsel] had tried for a 'grandstand play' that had backfired." Pet. App. 104; see E.R. 27-28. With the consent of the parties, the district court instructed the jury that the court had "made a mistake in allowing the questioning with regard to the Purple Heart medal" and that the jury should "disregard completely all of Mr. Swisher's testimony with regard to that military commendation." E.R. 29; see Pet. App. 104.

d. During presentation of the defense case, the government brought to petitioner's and the district court's attention a letter, of which the prosecutor had recently received a copy, from a Marine Corps official to the Idaho branch of the Department of Veterans Affairs. Pet. App. 103-105 & n.13. The letter discussed the replacement discharge form Swisher had produced at trial, which Swisher had also used for purposes of obtaining veteran benefits. *Id.* at 105. The letter said that the form did not appear in Swisher's official file; that Swisher's official file did not show him receiving any medals; that Swisher had not been injured in combat;

and that some of the medals listed on the form Swisher had produced had not existed on the date listed on the form. *Ibid.*

The same day, Swisher's official military personnel file arrived at the court via subpoena. Pet. App. 104-105. It contained an original copy of Swisher's discharge form, which listed no medals or combat wounds, and a copy of the Marine Corps letter that the government had brought to the court's attention. *Id.* at 105-106. It also contained photocopies of documents petitioner had presented to the Department of Veterans Affairs: (1) the replacement discharge form that he had produced at trial, and (2) what appeared to be a contemporaneous letter attesting to Swisher's entitlement to wear the Purple Heart and other medals. *Id.* at 106. Upon initially examining the file, the district court said that the file appeared to state that Swisher had participated in "top secret activities" and was "awarded the medals he says he was awarded." *Ibid.* But on further review, the court ultimately found the file to be "very difficult to decipher," with documents that were "neither self-authenticating nor self-explanatory." *Ibid.* The court was "'not convinced' one way or the other whether the Swisher-produced [replacement discharge form] was credible," and it suggested that conclusive evidence on this point might come from a custodian of military records or from the person whose signature appeared on the documents Swisher had produced. *Ibid.*

Petitioner did not move for a continuance to obtain such evidence. Pet. App. 106-107. He instead moved to introduce Swisher's military personnel file, as well as the letter from the Marine Corps to the Department of Veterans Affairs, into evidence. *Id.* at 107.

The district court denied the motion on two grounds. Pet. App. 107. First, the court determined that the documents should be excluded under Federal Rule of Evidence 403, which provides that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by," *inter alia*, "the danger of * * * confusion of the issues, * * * [or] considerations of undue delay [or] waste of time." Fed. R. Evid. 403. The district court reasoned that the documents were unauthenticated and inconclusive; that "[w]ithout an adequate foundation, the jury would have no way to determine which documents to credit"; that establishing a foundation would "require considerable time"; and that "[t]he court is unwilling to allow this issue to become a distracting side show to the trial and so finds that it could be confusing to the jury to introduce these confusing documents and could distract the jury from their primary purpose." E.R. 47; see Pet. App. 107. Second, the district court concluded that the documents were inadmissible under Federal Rule of Evidence 608(b), which provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime * * * may not be proved by extrinsic evidence." Fed. R. Evid. 608(b). The court rejected petitioner's argument that the documents were probative of whether Swisher had committed "fraud on the court," observing that the relevant testimony had been stricken from the record, and instead concluded that the evidence would be directed at an alleged instance of prior fraud against the government. E.R. 46; see Pet. App. 107.

The district court did, however, offer that the defense could reopen cross-examination on Swisher's mili-

tary record and could reference (though not introduce into evidence) the extrinsic documents in doing so. Pet. App. 107-108; E.R. 46-47. Petitioner's counsel chose not to reopen the cross-examination. Pet. App. 108.

e. During its summation, the government argued that petitioner solicited Swisher to kill the federal officials because "[h]e understood Mr. Swisher had a military record and that he had served in combat and killed people. It's the kind of person that he thinks will do such a thing." E.R. 52; see Pet. App. 108. The jury found petitioner guilty on the charges concerning his solicitation of Swisher. *Id.* at 99 & n.5. The jury deadlocked on three charges concerning petitioner's solicitation of another acquaintance to torture and kill the same federal officials. *Id.* at 99 & n.4. It acquitted petitioner on three additional solicitation charges and the charges of threatening to kill the children of two of the federal officials. *Id.* at 98-99 & nn.3, 7.

3. Following his conviction, petitioner moved for a new trial. Pet. App. 108. Among other things, he argued that he had "newly discovered evidence": two affidavits from military officials, including one from the officer who had allegedly signed the replacement discharge form produced by Swisher at trial, stating that the replacement discharge form was forged. *Id.* at 108-109.[2]

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[2] There is no longer any dispute that, although Swisher served in the military, he did not serve in Korea and did not receive the Purple Heart or any other decorations. Over two years after the district court proceedings concluded, Swisher was indicted and convicted of knowingly wearing a military decoration to which he knew he was not entitled, in violation of 18 U.S.C. 704(a); willfully and knowingly making false representations to obtain benefits to which he was not entitled, in violation of 18 U.S.C. 1001(a)(2) and (3); and presenting false testimony and a

The district court denied the motion. Pet. App. 352-382. It concluded that the substance of these affidavits was not "new" and was largely cumulative of the information petitioner possessed at trial; that petitioner's counsel had not been diligent in discovering it; that it would not be admissible in a new trial; and that it was not material. *Id.* at 352-362. The district court found "meritless" petitioner's "attempts to recharacterize the evidence as central to the Government's case by arguing that Swisher's silent wearing of a miniature Purple Heart lapel pin on his breast-pocket while testifying made his military record 'intrinsic to both his credibility and the Government's theory of the prosecution.'" *Id.* at 356 (brackets omitted). The district court reasoned that "the Government elicited on direct examination only that [petitioner] *believed* that Swisher had substantial combat experience; whether or not Swisher had *actually* served in combat or was wounded and decorated was never relevant to the key question as to whether [petitioner] thought Swisher to be a potential contract killer who would willingly agree to murder three federal officials [petitioner] wanted dead." *Id.* at 356-357.

4. A divided panel of the court of appeals reversed, remanding for a new trial on the basis of the newly produced affidavits. Pet. App. 228-336. The panel concluded, among other things, that the documents would allow the defense to undermine Swisher's testimony in a new trial. *Id.* at 309-312.

The panel did not, however, reach the issue of whether the district court had abused its discretion in

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forged document to obtain benefits to which he was not entitled, in violation of 18 U.S.C. 641 and 642. Pet App. 257-258. The Ninth Circuit affirmed his conviction *United States* v. *Swisher*, 360 Fed. Appx. 784 (2009).

excluding the documentary evidence about Swisher that petitioner had sought to introduce at trial. Pet. App. 228. It did state, in passing, that exclusion had been improper under Rule 608(b), reasoning that the evidence was not addressed to an out-of-court incident of untruthfulness, but instead was relevant to impeach an in-court "statement" that Swisher had made by wearing a Purple Heart pin. *Id.* at 272-273. But the panel also stated that "the district court's evidentiary ruling under Rule 403 was almost certainly not an abuse of discretion." *Id.* at 272.

Judge McKeown dissented. Pet. App. 313-336. She stated, among other things, that "I cannot think of a clearer example of a collateral issue than Swisher's military service." *Id.* at 330. "[T]he real issue," she explained, was petitioner's "perception of Swisher's purported prowess and daring, not the truth of his military service." *Id.* at 331-332. She found the "majority's discussion of the wearing of the Purple Heart by Swisher" to be "misplaced," observing in part that the testimony regarding that issue had been stricken. *Id.* at 332 n.6; see *id.* at 331.

5. a. On rehearing en banc, the court vacated the panel decision, and a limited en banc court affirmed petitioner's convictions. Pet. App. 92-224; see 9th Cir. R. 35-3 (initial en banc court consists of chief judge and ten active circuit judges). The court first clarified that its abuse-of-discretion standard for reviewing the denial of a motion for a new trial consists of a two-part test: (1) whether the district court identified and applied the correct legal rule; and (2) whether any of the district court's ruling "resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." Pet.

App. 123. Applying that standard, the court affirmed the district court's conclusion that no new trial was warranted based on newly discovered evidence. *Id.* at 125-132. The court noted, among other things, that "the material point was whether Swisher *told* [petitioner] he had killed men in battle, not whether he had actually done so." *Id.* at 129; see *id.* at 130-132.

The court also addressed and rejected petitioner's argument that the district court had abused its discretion in excluding the documents about petitioner's military record. Pet. App. 133-134. The court concluded that exclusion had been permissible under Rule 403 (and therefore did not reach the alternative Rule 608(b) ground). *Ibid.* The court observed that deference was proper in reviewing Rule 403 rulings, because "considerations arising under Rule 403 are 'susceptible only to case-by-case determinations, requiring examination of the surrounding facts, circumstances, and issues.'" *Id.* at 133 (citation omitted). As to this case, it explained:

> Here, the district court weighed the limited probative value of the evidence—to impeach testimony by Swisher about his Purple Heart medal, which testimony the jury had already been instructed to disregard—against the time it would take to authenticate and explain the military file (which the court found facially indecipherable) and the risk of confusing the jury with the tangential evidence. The court concluded the risk substantially outweighed the reward, and this conclusion, which was not illogical nor implausible based on the record, did not exceed the bounds of the district court's discretion in applying Rule 403.

Id. at 133-134.

b. Judge William Fletcher (who had written the panel majority opinion), joined by four other judges, dissented. Pet. App. 136-224. He reiterated the original panel majority's reasoning for believing a new trial was warranted. *Id.* at 173-224. He also expressed the view that the district court had committed reversible error at trial by excluding the documentary evidence regarding Swisher's military record. *Id.* at 169-173. He believed that the evidence addressed the credibility of a "statement" Swisher had made in court by wearing a Purple Heart pin, and it was therefore not excludable under Rule 608(b) as extrinsic evidence of a prior untruthful statement. *Id.* at 170-171. He also departed from the original panel majority opinion to conclude that the district court abused its discretion by excluding the evidence under Rule 403. *Id.* at 172-173. In his view, it would have been relatively straightforward to present the evidence to the jury, and the evidence would have given the jury a "significantly different impression" of the credibility of a critical government witness. *Id.* at 173.

6. The court of appeals denied a petition for reconsideration by the limited en banc panel or rehearing by the full court. Pet. App. 1. Chief Judge Kozinski, who had previously been a member of the majority, dissented. *Id.* at 2. He stated that after reading *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam), and an amicus brief that had been filed in this case, he was of the opinion that he "had underestimated the trust some jurors would have placed in Swisher if they thought he was a decorated combat veteran, and the likely backlash if they had learned he was a fraud." Pet. App. 2. Chief Judge Kozinski therefore joined Judge Fletcher's dissent from the denial of rehearing, which replicated

Judge Fletcher's dissent from the decision of the limited en banc court. *Id.* at 2; see *id.* at 3-91.

ARGUMENT

Petitioner asserts (Pet. 10-22) that the district court abused its discretion in excluding documentary evidence concerning Swisher's military record.[3] The court of appeals' fact-bound decision is correct and does not conflict with any decision of this court or any other court of appeals. No further review is warranted.

1. As a threshold matter, certiorari is unwarranted because the petition does not raise a legal question of general application, but instead seeks review of the application of settled law to the particular facts of petitioner's case. Although petitioner expresses (Pet. 11-14) some disagreement with the court of appeals' formulation of the abuse-of-discretion standard, he does not ask this Court to review that standard, but instead merely seeks review of the *application* of the standard to these facts. Pet. i; see Pet. 14 ("[E]ven under the en banc majority's pinched standard of review, the district court's exclusionary ruling was deeply flawed in the first instance because the trial ruling rested on a fundamental error of law."). He suggests neither that the court of appeals misinterpreted the law nor that its application of the law to the unique facts of this case is likely to have a substantial impact on future cases. Cf. Pet. 11-12 (referring to previous defendant-favorable precedent in the

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[3] Petitioner does not appear to renew in this Court any of his other claims, including his request for a new trial based upon "newly discovered evidence." He does not, for example, argue that the court of appeals erred in affirming the district court's conclusion that he failed to exercise sufficient diligence in obtaining the additional evidence. See Pet. App. 127.

court of appeals).[4] This Court "rarely grant[s]" a petition for a writ of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and there is no good reason to do so here.

2. Further review is unnecessary in any event because the district court did not abuse its discretion in excluding the documentary evidence of Swisher's military record.

Petitioner briefly contends (Pet. 14-15) that the district court misapplied the rules of evidence in arriving at its ruling. That contention lacks merit. His only argument that the district court abused its discretion by excluding the documents under Rule 403 is that the Rule 403 determination "plainly rested in part on [the court's] flawed conclusion that the evidence was inadmissible as a matter of law under Rule 608(b)." Pet. 14-15. But even assuming the correctness of petitioner's premise (that the Rule 608(b) ruling was flawed), his conclusion (that the Rule 403 ruling also was flawed) does not follow. Neither the majority nor the dissent in the court of appeals found the two grounds for exclusion to be so intertwined. The majority affirmed the evidentiary ruling on Rule 403 grounds, and it concluded that it therefore "need not reach the issue raised under Rule 608(b)." Pet. App. 133. The dissent perceived a need to address and reject both grounds separately in order to support its conclusion that the district court had erred. *Id.* at 169-173.

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[4] To the extent that petitioner is arguing that the outcome in his case is inconsistent with precedent from the same court of appeals, that argument is properly directed to the court of appeals rather than to this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

The court of appeals properly affirmed the court of appeals' Rule 403 determination. Petitioner asserts that the documents were offered "to show [Swisher's] bias, self-interest, and his particular substantive lies in this case." Pet. 14 (emphasis omitted). But petitioner does not explain how Swisher's military record would demonstrate bias or self-interest with respect to petitioner's prosecution. Nor is it clear what "substantive lies" Swisher told "in this case." The government did not elicit any testimony about petitioner's claimed medals or combat experience on direct examination. Pet. App. 100, 173; E.R. 21-22. Petitioner argued to the district court at the time of its evidentiary ruling that the documents were necessary to rebut statements that Swisher had made on cross-examination, but those statements had been stricken from the record and the jury had been instructed to disregard them. E.R. 39-43; see E.R. 29 (district court instructing jury that "everything from where I asked [petitioner's counsel] to re-open, please strike that from your minds; and you are not to consider it as evidence in the case").[5]

Counterbalanced against whatever probative value the documents might have had, the district court had substantial reason for its unwillingness "to allow this

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[5] Petitioner did not argue at that time, and does not expressly argue now, that wearing the Purple Heart pin itself constituted an in-court statement to the jury, as the court of appeals dissenters believed. Pet. App. 170-171. And even if he had made that argument, and it were correct, it is unclear that the jury placed any weight on the pin, as the only time it was either pointed out that Swisher was wearing a pin or explained that the pin was a Purple Heart was during the cross-examination testimony that the jury was instructed to disregard. E.R. 25, 29; see *United States* v. *Olano*, 507 U.S. 725, 740 (1993) ("It is the almost invariable assumption of the law that jurors follow their instructions.") (brackets and citation omitted).

issue to become a distracting side show." E.R. 47. First, the documents were difficult for the jury to understand and of indeterminate usefulness to petitioner. The district court's initial determination was that the documents *supported* Swisher's claims; on further examination, the district court found the documents "not explanatory." Pet. App. 106; E.R. 47. Second, the documents were unauthenticated and foundation would need to be laid for them, an enterprise likely to consume considerable time and resources. Pet. App. 133; E.R. 47. Third, the district court noted that the government "would have to be allowed to introduce conflicting documents or testimony of military officers to explain them" if they were introduced, requiring that even more time and resources be devoted to this issue. E.R. 47.

Fourth, and perhaps most importantly, there was a risk "of confusing the jury with tangential evidence." Pet. App. 133-134; see E.R. 47. "[T]he material point was whether Swisher *told* [petitioner] he had killed men in battle, not whether he had actually done so." Pet. App. 129. The district court did not abuse its discretion in declining to allow petitioner to divert a substantial portion of the trial into examining the latter issue.

3. Petitioner also contends (Pet. 15-22) that even if the district court's evidentiary ruling was correct, he had a constitutional right to offer the documents into evidence. Neither the majority nor the dissenting judges on the court of appeals addressed that issue, and it would be a departure from the Court's normal practice to review it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.9 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioner's constitutional argument lacks merit. Petitioner invokes the "constitutionally

protected right of cross-examination" recognized in *Olden* v. *Kentucky*, 488 U.S. 227 (1988) (per curiam), and other cases. Pet. 15 (quoting *Olden*, 488 U.S. at 230-231). But "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). The district court in this case did in fact offer petitioner the opportunity to cross-examine Swisher on his military record. Pet. App. 107-108; E.R. 46-47. And it would have permitted him to use the extrinsic documents in doing so, as long as petitioner did not seek to introduce those documents into evidence. *Ibid.* Petitioner declined that offer. Pet. App. 108.

The district court's decision not to allow petitioner to introduce particular documents into evidence during cross-examination does not conflict with *Olden* or any other decision of this Court. The constitutional violation in *Olden* occurred when a trial court prohibited a defendant from introducing any evidence (including through cross-examination of the victim) about the victim's extramarital live-in relationship, when the relationship potentially gave the victim a motive to falsely accuse the defendant of rape and when the victim had lied on direct examination about her living arrangements. 488 U.S. 230-232; see *id.* at 232 (recognizing trial court's broad discretion reasonably to limit cross-examination, but concluding that "the limitation here was beyond reason"). This case differs from *Olden* because (1) the court *did* permit petitioner an opportunity for cross-examination on the disputed topic (which petitioner declined); (2) the witness did not make any false statements on direct examination; and (3) the topic on which

petitioner sought to introduce evidence related to Swisher's credibility, rather than a specific motivation to lie.[6]

Petitioner suggests (Pet. 17-22) that the exclusion of Swisher's military record takes on constitutional dimension because the jury's view of Swisher would have changed so dramatically had the evidence been allowed. Petitioner asserts (Pet. 20) that Swisher "presented himself to the jury as * * * a combat hero wounded in the Korean War," and he argues that the jury would have turned on Swisher had it known such a presentation to be false. But petitioner's argument overlooks several issues: the only testimony in which Swisher asserted that he was a decorated combat veteran of the Korean conflict arose in cross-examination that the jury was instructed to disregard; the district court did not believe that the documents petitioner sought to introduce would necessarily have disproved Swisher's assertions; and petitioner voluntarily declined the opportunity to cross-examine Swisher on this issue.

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[6] Other cases cited in passing by petitioner likewise do not involve credibility evidence, but instead evidence that addresses the truth or falsity of issues directly before the jury. See *Holmes* v. *South Carolina*, 547 U.S. 319, 321 (2006) (defendant sought to introduce evidence of third-party guilt); *Crane* v. *Kentucky*, 476 U.S. 683, 684 (1986) (defendant sought to introduce evidence of circumstances of his confession to argue that it had been involuntary), *Davis* v. *Alaska*, 415 U S. 308, 311 (1974) (defendant sought to introduce witness's probationary status not "as a general impeachment of [his] character as a truthful person," but to show that he "acted out of fear or concern of possible jeopardy to his probation" when he interacted with police); *Washington* v *Texas*, 388 U.S. 14, 16 (1967) (defendant in murder case sought to introduce testimony of eyewitness who claimed to have shot the victim himself out of defendant's presence)

Even without admitting the documents into evidence, petitioner could have used them to cross-examine Swisher, and he furthermore could have used other evidence (such as Swisher's age at the time of the Korean conflict) to demonstrate to the jury that Swisher was not being truthful about his military record. See Pet. App. 101; E.R. 25. Petitioner's decision not to do so does not provide the basis either for an assertion of a constitutional violation or for review by this Court.

4. Finally, petitioner's request (Pet. 22) for summary reversal in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam), lacks merit. In *Porter*, this Court concluded, on federal habeas review, that an attorney had been constitutionally ineffective in failing to introduce certain mitigating evidence in the penalty phase of a capital case. *Id.* at 448. The mitigating evidence that should have been presented included evidence of the defendant's heroic military service in Korea and the trauma caused by his participation in the war. *Ibid.*; *id.* at 455.

This Court's recognition that a penalty-phase jury could attach significant mitigating weight to a capital defendant's military service does not compel the conclusion that petitioner in this case was entitled to introduce documentary evidence of Swisher's military record. Unlike in a capital sentencing, in which a defendant has a constitutional right to present all available mitigating evidence in order to argue that he should not be sentenced to death, petitioner's military record was not directly at issue here. The government's case was based only on Swisher's *claim* to have a certain military record. See Pet. App. 106. The jury is presumed not to have attached any weight (in assessing Swisher's credibility or otherwise) to testimony about Swisher's

military recor . that it was instructed to disregard, and petitioner declined the opportunity to reopen cross-examination in order to inquire into Swisher's military record. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

DAVID ROLAND HINKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The government asserts petitioner Hinkson has claimed nothing more than that "the district court abused its discretion in excluding documentary evidence concerning Swisher's military record, [a] fact-bound decision [that] is correct and does not conflict with any decision of this court or any other court of appeals, [and which] does not raise a legal question of general application. . . ." (Govt. Opp., at 13) The government further contends that petitioner "suggests neither that the court of appeals misinterpreted the law nor that its application of the law to the unique facts of this case is likely to have a substantial impact on future cases." (*Id.*)

To the contrary, Hinkson argued both to the Court of Appeals and here that (a) under this Court's precedents, he was entitled as a matter of constitutional and statutory right to introduce documentary evidence conclusively proving that Eldon Swisher, the government's chief witness against him, mounted the witness stand intending to commit perjury and to proffer forged documents on an issue critical to the government's case; and (b) the en banc opinion, left undisturbed, will indeed "have a substantial impact on future cases."

2. The pivotal issue on the counts of conviction was the credibility of Swisher's uncorroborated testimony that he had been solicited to commit murder by Hinkson. Unless jurors were convinced beyond a

reasonable doubt that Swisher could be trusted to tell the truth, they would be required to acquit, because "[w]ithout Swisher, the government had no case." *United States v. Hinkson*, 611 F.3d 1098, 1099 (9th Cir. 2010) (Kozinski, J., dissenting)

It is undisputed that Swisher committed a federal crime of moral turpitude by appearing in court wearing a phony Purple Heart commendation; that he lied under oath when he testified that, as the government asserted in its opening statement, he had served in combat; and that he tendered forged documents to the trial court and jury attesting to other prestigious military commendations he had never earned. (*See* Govt. Opp., at 8-9, n.2)

Yet the en banc majority below held, and the government here asserts, that the issue of whether Swisher had lied to the jury and committed a fraud on the court was "tangential" and "unrelated to the factual issues to be resolved by the jury." (*Id.*, at 16, citing Pet. App., at 129, 133) Plainly, this ruling is far more than a "fact-bound" application of the abuse of discretion standard, as it eviscerates the right of a criminal defendant to challenge the credibility of the prosecution's core evidence, as recognized in cases such as *Washington v. Texas*, 388 U.S. 14, 19 (1967) and *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

3. The government contends that this Court should not reach the issue of whether Hinkson "had a constitutional right to offer the documents into evidence" that would have exposed Swisher's perjury,

because, although that constitutional claim was the centerpiece of Hinkson's Ninth Circuit briefing, the en banc majority below did not address it in its opinion. (Govt. Opp., at 16) But an opinion that ignores this Court's constitutional jurisprudence conflicts with, and misinterprets, that law by omission. Indeed, it is the very failure of the en banc majority to consider this Court's precedents in *Washington*, *Crane*, *Olden v. Kentucky*, 488 U.S. 227 (1988), and others that renders the opinion so pernicious in terms of its "impact on future cases." The teaching of the opinion below is that, in deciding whether the defense may gain admission of evidence which fundamentally undermines the credibility of the prosecution's core evidence, a trial court need not take account of a defendant's rights under the Fifth, Sixth, and Fourteenth Amendments, as interpreted by this Court.

4. The government acknowledges that petitioner has consistently argued through the course of this appeal that the excluded documents would have proven Swisher's bias and interest in his testimony against petitioner, but claims that "petitioner does not explain how Swisher's military record would demonstrate bias or self-interest with respect to petitioner's prosecution." (Govt. Opp., at 15). The excluded military records would have indisputably established that Swisher, as the government now concedes, had used the forged documents he tendered in court to fraudulently obtain veterans benefits to which he was not entitled, a federal offense that was continuing at the time Swisher testified against petitioner. This

Court has held that a defendant has a constitutional right to prove that a government witness is vulnerable to prosecution, as Swisher plainly was, because the witness's "fear or concern for possible jeopardy" creates a bias and interest in testifying for the prosecution. *Davis v. Alaska*, 415 U.S. 308, 311 (1974) (cited in Govt. Opp., at 18 n.6)

5. The government correctly notes that the petitioner contends that "the exclusion of Swisher's military record takes on constitutional dimension because the jury's view of Swisher would have changed dramatically had the evidence been allowed." (Govt. Opp., at 18) Both the en banc majority opinion and the district court ruled to the contrary, holding that the excluded evidence exposing Swisher as a military fraud had "limited probative value" in impeaching his credibility. 585 F.3d at 1267 (App. 133, 134). In their view, had jurors at Hinkson's trial learned Swisher was a military fraud, they would still have accepted his uncorroborated testimony that Hinkson made him a serious offer to pay for the murder of federal officials.

In his petition, petitioner contended that assessment of petitioner's jury was so patently unreasonable as to be an error as a matter of law. *See Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447 (2009) (State courts had acted unreasonably in discounting the impact that evidence of a defendant's "heroic military service" in combat in the Korean War would have had on a penalty phase jury in a capital case) Since the filing of Hinkson's petition for a writ of certiorari, this

Court decided another case which exposes the en banc majority's fundamental misunderstanding of the esteem with which veterans in general, and combat veterans in particular, are held in our society.

The issue in *Henderson ex rel. Henderson v. Shinseki*, ___ U.S. ___, 131 S. Ct. 1197 (March 1, 2011) was whether a time limit for appeals of denials of claims for service-related disability benefits found in the Veterans' Judicial Review Act (VJRA) was jurisdictional, or whether a failure to meet that deadline could be forgiven for equitable reasons. In reversing an administrative decision that the limit was jurisdictional, this Court took note of "Congress' longstanding solicitude for veterans, *United States v. Oregon*, 366 U.S. 643, 647 . . . (1961)," which is "plainly reflected in the VJRA and in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Shinseki*, 131 S. Ct. at 1199.

As is true of Congress, American jurors would certainly place a "thumb on the scale" in favor of the credibility any witness they believed to be a combat veteran. Conversely, they would come down with a heavy fist on the other end of that scale if they were to learn that a witness such as Swisher had both lied to them and stolen veterans' benefits by falsely claiming he had been wounded in combat.

6. The government claims that the jury must be "presumed not to have attached any weight (in assessing Swisher's credibility or otherwise) to testimony

about Swisher's military record that it was instructed to disregard . . . " (Govt. Opp., at 19-20) But "the prosecutor described Swisher in his opening statement as a 'Combat Veteran from Korea during the Korean Conflict' who 'was not averse to . . . violent, dangerous activity,' and stated in his closing argument that Hinkson 'understood' that Swisher 'had served in combat and killed people.'" 611 F.3d at 1132 (W. Fletcher, J., dissenting from the denial of rehearing en banc) (App. 88). The jury was never told by the government that, contrary to its position in opening argument, Swisher had never served in combat, nor that the Purple Heart he wore into court was a fraud, although the government was well aware of that fact by the time of its closing argument. It cannot be presumed that jurors divined Swisher's mendacity when the government went to great length to hide his lies from them, and succeeded in that object.

7. Petitioner has argued that even under a simple abuse of discretion standard, the district court's exclusion of the documents which exposed Swisher's perjury and fraud requires reversal, for it rested on fundamental error of law: the trial court's ruling that the subject of Swisher's falsehoods was "collateral," rendering the impeachment evidence inadmissible under Federal Rule of Evidence 608(b). Neither the en banc majority nor the government attempted to defend that ruling (*see* Govt. Opp., at 14), because it is indefensible.

8. Finally, the en banc ruling would likely lead to a repeat of the sort of *Brady-Giglio*[1] scandals in which the Department of Justice has been recently implicated. In *United States v. Stevens*, Criminal Case No. 08-231 (D.D.C.), the government's prosecution of Alaska Senator Ted Stevens collapsed when it was revealed that the government had suppressed evidence tending to impeach the credibility of its chief witness, Bill Allen. Just last week, a panel of the Ninth Circuit reversed the conviction of another Alaska political figure who also had been prosecuted chiefly on the basis of Allen's testimony, *United States v. Kohring*, ___ F.3d ___, 2011 WL 833263 (9th Cir. 2011). The evidence concerning Allen tended to prove that he had attempted to suborn perjury in another case. The evidence exposing Swisher's perjury in this case was certainly no less powerful impeachment than that at issue in *Stevens* and *Kohring*.

The governmental suppression of evidence favorable to the defense constitutes a *Brady* violation only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Here, the government's chief witness concocted a plan to commit perjury and tender false documents in court, yet the en banc majority deemed such conduct to be

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

"tangential" and "unrelated to the factual issues to be resolved by the jury." Under that logic, prosecutors in the future who learn that a government witness intends to perjure him or herself on the witness stand are free to keep that information to themselves on the ground that, under *Hinkson*, such devastating impeachment evidence is not "material." That danger alone is sufficient reason to grant certiorari and vacate the en banc majority opinion.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted and the matter set down for full briefing, or the judgment of the Ninth Circuit should be summarily reversed and the matter remanded for a new trial.

Dated: March 17, 2011

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